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

AB-7988
File: 02/06/09/10/12/17/24-9667 Reg: 01051314

GUINNESS UDV NORTH AMERICA, INC.
151 Commonwealth Drive, Menlo Park, CA 94025,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Robert R. Coffman

Appeals Board Hearing: March 13, 2003
San Francisco, CA

ISSUED JUNE 6, 2003

Guinness UDV North America, Inc. (appellant or UDV), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its distilled spirits licenses for 15 days[2] for directly or indirectly furnishing, giving, or lending money or other thing of value to Chevy's, Inc., and for paying money to Chevy's, Inc., or its agent, A Change of Pace, for the privilege of placing an alcoholic beverage advertisement in a licensed premises, violations of Business and Professions Code[3] sections 25500, subdivision (a)(2), and 25503, subdivision (h).

Appearances on appeal include appellant Guinness UDV North America, Inc., appearing through its counsel, James M. Seff and J. Daniel Davis, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

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[1]The decision of the Department, dated May 16, 2002, is set forth in the appendix.

[2]The Department's order suspended the license for 15 days for each of the two statutes violated, with the suspensions to run concurrently.

[3]Statutory references in this opinion are to the Business and Professions Code unless otherwise indicated.

FACTS AND PROCEDURAL HISTORY

Appellant holds various non-retail alcoholic beverage licenses.[4] The Department issued a 10-count accusation against appellant alleging five instances of violations of sections 25500, subdivision (a)(2) (section 25500(a)(2)), and 25503, subdivision (h) (section 25503(h)) during 1999.

An administrative hearing was held on January 31 and February 26, 2002, at which time oral and documentary evidence was received. At that hearing, testimony concerning the allegations of the accusation was presented by Andrew Coleman and Brian Bousley, employees of appellant; Jennifer Miramontes and Jeannine Henderson of A Change of Pace; Isaac Gerstenzang and Bruce MacDiarmid of Chevy's, Inc.; and Department investigator Lori Jovovich.

Appellant distributes Jose Cuervo Tequila to California retail licensees, including Chevy's, Inc. (Chevy's), an on-sale licensee that operates Chevy's Restaurants, a chain that specializes in serving Mexican-style food. Chevy's, for a number of years during the 1990's, sponsored running events called "Chevy's Fresh Mex Runs" and water events called "Chevy's Fresh Mex Bathtub Regattas." These events were conducted for Chevy's by an event management and promotions company, A Change of Pace (ACOP). Often, Chevy's employees assisted during the events, as did volunteers provided by local non-profit organizations. The non-profit organizations received cash for providing the volunteers.

Chevy's agreed to pay ACOP $10,000 per event to be the primary or "title" sponsor of these events. Chevy's also provided ACOP with a list of other potential sponsors for

[4]The licenses held by appellant are: winegrower, still, beer and wine importers general, distilled spirits importer, beer and wine wholesaler, and distilled spirits rectifiers general.

ACOP to solicit. Appellant, one of several alcoholic beverage suppliers on the list, was solicited by ACOP and agreed to pay ACOP $6,000 per event to be a secondary sponsor. The ALJ found that, while the events "were designed and staged for the benefit of [and] to promote Chevy's restaurants," they "also provided a marketing or advertising opportunity for [the] secondary sponsors who contributed money to have their product names displayed . . . at the events . . . ." (Finding of Fact 3.) Pursuant to appellant's agreement with ACOP, the Jose Cuervo logo, identifying appellant as one of the sponsors of the Chevy's Fresh Mex Races and Regattas, was included on the thousands of race entry fliers, the T-shirts worn by participants, the banners near the finish line, and other promotional materials and opportunities. There were various secondary sponsors, some of whom made in-kind contributions, but the alcoholic beverage licensees that were sponsors provided only cash, making up approximately $117,000 of the $124,412 ACOP claimed to receive from California advertisers during 1999.

The evidence did not establish that Chevy's actually paid $10,000 per event as called for in its agreement with ACOP. At least nine events were held in California in 1999, which would have obligated Chevy's to pay ACOP $90,000, but evidence in the record shows only $34,104, at most,[5] being paid. Witnesses from Chevy's and ACOP testified that Chevy's made in-kind payments to ACOP, but that no records were kept documenting the monetary value of these contributions.

Following the hearing, the Department issued its decision which determined that the violations charged had been established. Appellant thereafter filed a timely notice

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[5]The evidence presented showed that Chevy's paid ACOP $6,000 for each of two September events and made an additional sponsorship payment for 1999 of $15,000. A payment of $7,104 was also made, but it was not established that this was for a Chevy's Fresh Mex event.

of appeal in which it raises the following issues: (1) The evidence does not support the conclusion that appellant violated section 25500(a); (2) the evidence does not support the conclusion that appellant violated section 25503(h); (3) Department rule 106(i)(2) (4 Cal. Code Regs., §106, subd. (i)(2)) specifically permits appellant's payments to ACOP; and (4) the Department's decision does not establish good cause to suspend appellant's licenses.

DISCUSSION

I

Appellant was charged with violating section 25500(a)(2), which provides that non-retail licensees shall not:

> Furnish, give, or lend any money or other thing of value, directly or indirectly, to, or guarantee the repayment of any loan or the fulfillment of any financial obligation of, any person engaged in operating, owning, or maintaining any on-sale premises where alcoholic beverages are sold for consumption on the premises.

Specifically, the accusation stated that, on various specified dates, appellant, "by and through its officers, directors, agents, or employees, did, directly or indirectly, furnish, give or lend money or other thing of value, to-wit: $12,000, to Chevys Inc, . . . in violation of Section 25500(a)(2) . . . ."

Appellant asserts there is no evidence that it gave, furnished, or loaned any money to Chevy's, directly or indirectly, as alleged in the accusation. The Department's decision, appellant argues, relies on "speculation" that Chevy's received some benefits other than the payments alleged in the accusation, but, even if substantial evidence supported Chevy's receipt of "benefits," the Department was required to prove appellant made the specific payments to Chevy's alleged in the accusation.

Appellant argues that the Department was bound by the charge of the accusation to prove that appellant made payments of specific amounts of money, on specific dates, to Chevy's. If the Department cannot prove those specific allegations, appellant asserts, "it cannot attempt to prove a different allegation which the accusation does not contain." (App. Opening Br. at p.5, fn. 5.)

Appellant appears to be arguing that there is a variance between the pleading and the proof offered at the hearing. While such a variance can constitute error, where it does not actually surprise or mislead the other party, there is no prejudice to that party. (Code Civ.Proc., § 469; See 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, §1146, and cases cited therein; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, §421, and cases cited therein.) Even in the case of a substantial variance, if an objection is not raised at the hearing, it is waived and may not be raised as an issue on appeal. (See 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, §1146, and cases cited therein.)

We do not believe there was a variance. An administrative accusation is required to apprise a licensee sufficiently of the charges so that it is able to prepare its defense. (Gov. Code, § 11503.) This accusation satisfies that requirement. The accusation clearly encompasses appellant's *furnishing* to Chevy's, directly or *indirectly*, money or *other thing of value*. The amounts and dates in the accusation serve to designate the payments made by appellant that the Department contends indirectly furnished a benefit to Chevy's. Appellant's argument simply ignores the phrase "other thing of value" found in both the statute and the accusation. There is no dispute that appellant made payments of the amounts alleged on the dates alleged; the only dispute is whether those payments indirectly provided a benefit, or thing of value, to Chevy's.

Even if there were a variance in this case, any variance that existed did not prejudice appellant or violate its right to due process. Appellant showed no lack of preparation nor any surprise as to the evidence or arguments produced against it during the hearing. Counsel for the Department made an opening statement regarding the issues, yet appellant did not object or ask for a continuance, but proceeded with the hearing without comment. Further, appellant had sufficient time, after presentation of the Department's evidence at the first day of the hearing, to secure any refutation available to it.[6] Additionally, the parties filed post-hearing briefs before the ALJ closed the record. Appellant has no basis for arguing that it did not receive fair notice of the charges against it or that it lacked the opportunity or ability to address them.[7]

In determining whether a benefit was indirectly provided to Chevy's in violation of section 25500(a)(2), the larger statutory context must be considered. The "tied-house" laws, of which section 25500 is one, were designed to prevent large firms from

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[6]Indeed, at the second day of hearing, on February 26, 2002, appellant submitted the declaration of Jennifer Miramontes, a witness called by the Department at the hearing on January 31, 2002. The declaration was objected to by the Department, but accepted by the ALJ as administrative hearsay. The declaration "explains" and expands upon Miramontes' previous testimony concerning Chevy's payment of ACOP's losses. (Exhibit H.)

[7]Appellant cites two cases in support of its position, *Endo v. State Bd. of Equalization* (1956) 143 Cal.App.2d 395, 397 [300 P.2d 366], and *Smith v. St. Bd. of Pharmacy* (1995) 37 Cal.App.4th 229, 241 [43 Cal.Rptr.2d 532]. The point for which *Endo* was cited, having to do with whether "knowing" permission had to be proven even though not required in Business and Professions Code section 24200, because of the way the accusation was worded, was implicitly rejected by the court in *Mercurio v. Department of Alcoholic Beverage Control* (1956) 144 Cal.App.2d 626, 631 [301 P.2d 474] ("'Knowingly' not being required in . . . section 24200, the use of that word in the accusation was immaterial and is not necessary to be found.") *Smith* involved wording in an accusation that the court found misled the defendant into believing that he needed to prepare a defense to a charge of personally dispensing medication, leaving him unprepared to contest the negligence theory that was argued at the hearing. Neither of these cases is helpful to appellant.

dominating local markets and from engaging in "overly aggressive marketing techniques." The statutory scheme established a three-tiered system designed to prevent manufacturers, wholesalers, and retailers from becoming horizontally or vertically integrated by keeping the three types of interests "distinct and apart." *(California Beer Wholesalers Assn, Inc. v. Alcoholic Bev. etc. Appeals Bd.* (1971) 5 Cal.3d 402, 407 [96 Cal.Rptr. 297].) "All levels of the alcoholic beverage industry were to remain segregated; firms operating at one level of distribution were to remain free from involvement in, or influence over, any other level." (*Id*. at p. 408.)

The court of appeal in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2002) 100 Cal.App.4th 1066 [123 Cal.Rptr.2d 278] *(Deleuze)*, considered the Department's interpretation and application of section 25502, subdivision (a)(2), which is the counterpart to section 25500(a)(2), applicable to off-sale retailers. The Department there charged ZD Wines (ZD), a winegrower licensee, with "furnish[ing], giv[ing], or lend[ing] money or other thing of value, directly or indirectly," to Wally's, an off-sale general retail licensee. Wally's contracted with George Rice & Sons (Rice) to produce holiday gift catalogs, containing only products carried by Wally's, in 1995 and 1996. In each of those years, ZD paid Rice for wine advertisements in the Wally's catalogs, $650 in 1995 and $750 in 1996. Following the Board's reversal of the Department's decision suspending ZD's license, the appellate court reinstated the Department's decision, finding that ZD had contributed "a valuable and tangible benefit to Wally's by participating in paying for the production of its exclusive sales catalog . . . ." (*Deleuze*, *supra*, 100 Cal.App.4th at p. 1075.) The court found the Department's application of the statute to be "consistent with the legislative purpose of the tied-house laws, as articulated in the *California Beer Wholesaler* decision. . . . An ongoing

relationship between a winegrower and a retailer such as that between ZD and Wally's could easily lead to the kind of influence of a supplier over a retailer the statutes were intended to prevent, for example, by causing the retailer to favor or 'push' the products of the wholesaler who chooses to pay for advertising in the retailer's catalog." (*Ibid*.)

While there are factual differences between *Deleuze* and the present case, the similarities are sufficient that we find *Deleuze* instructive. Section 25500(a)(2) is designed to prevent the same type of "ongoing relationship" between a supplier, appellant here, and an on-sale retailer, Chevy's, that could lead to Chevy's favoring the products of appellant, who chooses to pay to sponsor and advertise in connection with a race designed to promote Chevy's. The fact that payment is made to a third party is irrelevant, since the benefit to Chevy's (support of the race that promotes Chevy's) and the possible evil (favoring appellant's products) still exist.

The Department's decision, in Legal Conclusion 3, correctly analyzed the situation, in our opinion:

> If UDV had underwritten Chevy's events to the tune of $50,000 per event, there would be little doubt it was providing something of value to Chevy's within the meaning of section 25500(a)(2). If it paid the money directly to Chevy's there would be no doubt it would be a violation of the statute. Contributing $6,000 per event to someone acting for Chevy's is different in method only; the end result is the same: in either case the section has been violated because UDV provided something of value to Chevy's. It is a violation because the Legislature chose to prohibit indirect as well as direct payments.
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> If the type of arrangement between Chevy's and UDV were condoned, the Legislative mandate embodied in section 25500(a)(2) would be circumvented. Such arrangement may avoid the "direct payment" language of that section, but if it were concluded such arrangement legally evaded the "indirect payment" prohibition, section 25500(a)(2) would be rendered largely ineffectual. The statute could easily be circumvented by use of indirect means, thereby elevating form over substance and subterfuge over the statute's express purpose.

Appellant argues that the Department's conclusion that it gave a benefit, rather than a payment, to Chevy's, is based not on substantial evidence, but merely on speculation and inferences. In reviewing this decision to determine whether it is supported by substantial evidence, the Appeals Board "may not confine [its] consideration to isolated bits of evidence, but must view the whole record in a light most favorable to the judgment, resolving all evidentiary conflicts and drawing all reasonable inferences in favor of the decision of the [Department]. [Citation.] . . . [W]e must accept any reasonable interpretation of the evidence which supports the [Department's] decision." (*Beck Development Co., Inc. v. Southern Pacific Transportation Company* (1996) 44 Cal.App.4th 1160, 1203 [52 Cal.Rptr.2d 518].)

A decision may be supported by an inference, as long as the inference is a reasonable conclusion deduced from the evidence and not based on mere suspicion, conjecture or guesswork. (*Beck Development Co., Inc. v. Southern Pacific Transportation Company*, *supra,* at p. 1204; *Krause v. Apodaca* (1960) 186 Cal.App.2d 413, 418 [9 Cal.Rptr. 10].) When the evidence raises an inference that a fact exists, the inference may be "rebutted by clear, positive and uncontradicted evidence of such a nature that it is not subject to doubt in the minds of reasonable men. The trier of the facts may not believe impossibilities." (*Krause v. Apodaca*, *supra*, at p. 419.)

We do not agree that the Department's conclusion was based on mere speculation. Rather, the ALJ drew reasonable inferences based on the evidence in the record of what the various parties agreed to, were invoiced for, and actually paid. These inferences were not rebutted by clear, positive and uncontradicted evidence. Nothing indicates to us that the ALJ believed "impossibilities." While opinions might differ as to the inferences that could be drawn from the evidence, this Board is bound to sustain

those that support the Department's decision. We conclude that substantial evidence supports the Department's determination that appellant violated section 25500(a)(2).

II

Section 25503(h) provides that a non-retail licensee may not:

> Pay money or give or furnish anything of value for the privilege of placing or painting a sign or advertisement, or window display, on or in any premises selling alcoholic beverages at retail.

Appellant contends that to establish a violation of section 25503(h), the Department must prove that ACOP paid Chevy's the money it received from appellant or that ACOP was Chevy's ostensible agent in receiving the payments from appellant. However, appellant argues, the evidence does not support a conclusion that Chevy's intentionally or negligently caused appellant to believe, erroneously, that ACOP was Chevy's agent when accepting payments from appellant.

The Department's decision addresses section 25503(h) in Legal Conclusion 4:

> The Department contends the evidence was undisputed that UDV gave money for the privilege of placing an alcoholic beverage advertisement on or in a retail licensed premises. The advertisement was the "Jose Cuervo" logo on race entry forms that were placed in Chevys' restaurants. The Department correctly contends the statute prohibits a supplier from paying anyone for placing advertising in a retail licensee's premises. This is because section 25503(h) does not specify the recipient of the money, e.g., that the money must be paid to a retailer.
>
> UDV argues this allegation must fail unless the Department can prove ACOP was Chevys' agent when it received UDV's payment, which the Department has failed to do.
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> Both parties rely on *Actmedia, Inc. v. Stroh*, 830 F.2d 957 (9[th] Cir. 1986). In *Actmedia* an alcoholic beverage supplier paid an intermediary company for advertising space in retailer grocery carts and the intermediary in turn paid the retailer for the space. In this matter ACOP made no such payments to Chevys. UDV contends it did not violate section 25503(h) because no payments were made to the retailer for advertising in the retailer's premises. The Department argues that the court did not base its holding on the fact the intermediary paid the retailer for the advertising space.

The arguments presented by the parties have merit: UDV is correct in that *Actmedia* is factually distinguishable: the supplier in that case paid the intermediary for advertising space in retail stores and the intermediary in turn paid the retailers for the advertising space. The Department is correct in asserting the court focused its discussion on alcoholic beverage licensees attempting to avoid tied-house regulations.

The court in *Actmedia* states that ". . . section 25503(h) was designed to prevent manufacturers and wholesalers from circumventing these tied-house restrictions by claiming that the illegal payoffs to alcoholic beverage retailers were 'advertising'." (p.967)

Irrespective of the parties' interpretations placed on the *Actmedia* case, it is concluded that section 25503(h) is violated when a wholesaler pays for the privilege of having an advertisement placed in a retail premises. The payment need not be made to the retailer. Evidence was clear that one of the primary things UDV paid for in sponsoring an event for $6,000 was the advertising of its product, including the advertising on or in Chevys' restaurants. However, the Accusation alleges more than is required by the statue; it specifically alleges UDV paid Chevys or its agent, ACOP, for the advertising in Chevys' restaurant. UDV's position is that ACOP was not Chevys' agent for such purpose.

ACOP could not have placed UDV's advertisements in Chevys' restaurant without Chevys' approval. That factor alone may not establish that ACOP was acting as Chevys' ostensible agent, but when considered in conjunction with the above Factual Findings and Legal Conclusions, it is determined that ACOP was acting as Chevys' ostensible agent in placing the advertisements in Chevys' restaurant. It is extremely doubtful the events would have taken place without the advertisements being placed in Chevys' restaurants. Either Chevys or ACOP, or both, placed the advertisements in the restaurants. UDV paid for the advertisements. The publicity and advertising UDV paid for is directed toward Jose Cuervo's name and logo being associated with Chevys' events and restaurants. An important element of the advertising UDV paid for was through event flyers and entry forms which were displayed and distributed in Chevys' restaurants.

In its appeal, appellant again argues that *Actmedia, Inc. v. Stroh* (9th Cir. 1986) 830 F.2d 957 (*Actmedia*), stands for the proposition that section 25503(h) is only violated when a payment is made to the retailer to place advertising inside a licensed retail premises. We, as did the Department, reject this contention.

Actmedia, Inc., leased the right to display advertising on the shopping carts of large chain supermarkets such as Safeway and Ralph's. The Adolph Coors Company (Coors), a beer manufacturer and distributor, paid Actmedia, Inc., to place 8½" by 11" Coors beer advertisements on supermarket shopping carts in Los Angeles and San Francisco. Actmedia, Inc., paid the supermarkets a percentage of what it received from the advertisers.

The Ninth Circuit Court of Appeals held that the Department's interpretation of section 25503(h), which prohibited Coors from using Actmedia's advertising program, did not violate the first amendment rights of Actmedia, Inc., and Coors to engage in commercial speech. The court reviewed California's enactment of the "tied-house" laws and the motives behind that enactment, and applied the four-part analysis of restrictions on commercial speech set out in *Central Hudson Gas & Electric v. Public Service Commission* (1980) 447 U.S. 557 [65 L.Ed.2d 341, 100 S.Ct. 2343] (*Central Hudson*). The first two factors in the *Central Hudson* analysis were not disputed,[8] and the court found the last two were also satisfied: section 25503(h) directly advances the governmental interest that it is intended to advance, and it is not more extensive than necessary to achieve its purpose.

The court said that, since other provisions of the law "explicitly prohibited alcoholic beverage manufacturers and wholesalers from making gifts, paying rebates, or otherwise 'buying' the favor of retailers . . . section 25503(h) was designed to prevent manufacturers and wholesalers from circumventing these other tied-house restrictions

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[8]The parties stipulated that the advertisements were lawful and not misleading, and "there [was] little question that California [had] a 'substantial' interest in exercising its twenty-first amendment powers . . . ." (*Actmedia*, *supra*, 830 F.2d at p. 965.)

by claiming that the illegal payments they made to retailers were for 'advertising.'" (*Actmedia*, *supra*, at p. 967.) The court concluded that the complete prohibition of payments for advertising from manufacturers and wholesalers to retailers furthered the interest of California in preventing manufacturers and wholesalers from gaining undue influence over retail establishments.

In addition, the court found that the complete prohibition of "advertising payments" being made to retailers from manufacturers and wholesalers relieved the Department from the impossible task of policing advertising agreements between retailers and suppliers, on a case-by-case basis, to determine whether payments to retailers were simply for advertising or whether they also bought some prohibited preferential treatment from the retailer. (*Actmedia*, *supra*, at p. 967.) The section 25503(h) prohibition was also appropriate, the court said, to achieve the state's interest in promoting temperance by limiting point-of-purchase advertising. (*Ibid*.)

Although it is true, as appellant points out, that the court in *Actmedia* referred several times to section 25503(h) prohibiting payments from wholesalers to *retailers*, that does not, ipse dixit, restrict violations of the statute to payments made to retailers. The court in *Actmedia* was acting on the facts before it, which showed payments from the wholesaler to Actmedia, Inc., and from Actmedia, Inc., to the retailers.

Appellant also argues that the Department's decision with respect to the section 25503(h) violation relies on an erroneous finding that ACOP was Chevy's ostensible agent. The Department, appellant asserts, provided neither facts nor legal argument supporting such a finding.

We do not believe that the finding of ostensible agency is a necessary element of the Department's determination that section 25503(h) was violated. As noted in the

decision, "the Accusation alleges more than is required by the statute; it specifically alleges [appellant] paid Chevys or its agent, ACOP, for the advertising in Chevys' restaurants." (Legal Conclusion 4.)

The Department referred to ACOP as Chevy's agent in the accusation, but we regard that as surplusage which can be ignored. (See *Mercurio v. Department of Alcoholic Beverage Control*, *supra*, 144 Cal.App.2d 626, 631.) Appellant asserts that it would have presented different evidence if the accusation had alleged that a violation occurred regardless of who it paid for advertising in the licensed premises. This apparent attempt to allege a due process violation must fail. As discussed above, appellant showed no surprise regarding this issue at the hearing, and it had both a second day of hearing and post-hearing briefing to refute the Department's contention.

Appellant's argument ignores the statute's failure to specify that a payment must be made to a particular person in order to constitute a violation. Under the plain language of the statute, a violation occurred because appellant paid ACOP to place an advertisement in Chevy's licensed premises. Where the statute on its face does not require payment to the retailer, appellant should not have been surprised that proof of payment to the retailer was unnecessary.

Appellant also contends that the race entry applications with their small Jose Cuervo logos do not violate section 25503(h), because they are not "point-of-purchase" advertisements. It distinguishes these from the 8½" by 11" advertisements placed on the inside and outside fronts of shopping carts that were considered in *Actmedia, Inc. v. Stroh*, *supra*.

We agree that the logos on race fliers are not the same as the shopping cart advertisements in *Actmedia, Inc.*, *supra*. That does not mean, however, that they are

not advertisements. Appellant presented no expert testimony or other evidence or argument to support its claim that the logos do not constitute advertisements. Although we tend to agree that the small logos probably "did not drive anyone to Chevy's bar to order a tequila" (App. Opening Br. at p. 6, ftnt. 7), the generation of an immediate urge to purchase a product is not, so far as we are aware, the standard for determining whether something is an advertisement. With no proof that they are not advertisements, we must sustain the Department's reasonable conclusion that the logos constituted advertising placed in the licensed premises as a result of appellant's payments to ACOP.

III

Appellant contends that its payments to ACOP to sponsor races were permissible because they complied with Department rule 106(i)(2). Rule 106(i)(2) provides that "suppliers may sponsor contests, races, tournaments, and other similar activities on or off licensed premises. Sponsorships shall be only in the form of monetary payments to bona fide amateur or professional organizations established for the encouragement and promotion of the activities involved." Sponsorship is also subject to several conditions, none of which are applicable here. Unfortunately, the Department did not provide any kind of definition in the regulation for the term "bona fide amateur or professional organizations established for the encouragement and promotion of the activities involved."

The Department's rules must not alter or extend the scope of the statutes that the rules implement. If the Department rule is within the scope of its authority, the rules are reviewable for abuse of discretion. If the Department's interpretation is reasonable, it must be upheld, even if other interpretations would also be reasonable. There has

been no contention that the rule is outside the scope of the Department's authority, and we believe the Department's interpretation of rule 106(i)(2) to be reasonable.

Appellant argues that ACOP falls within the rule because it encourages and promotes races, which constitute the "activity involved." As evidence of ACOP's encouragement and promotion of races, appellant cites its name, A Change of Pace; its letterhead describing its business as "Sports marketing, Management, Promotions, Computerized timing"; its establishment 15 years ago to conduct and promote a race; its involvement in about 50 races a year; its receipt of revenue from race participant entry fees and race sponsorships; its use of various title sponsors for races; its time and effort spent preparing for, promoting, and conducting a race; and appellant's own confirmation that ACOP was a bona fide organization that promotes races. The Department refuses to apply rule 106(i)(2), appellant argues, simply because ACOP is a "for-profit" organization, "even though the rule specifically permits payments to 'professional' organizations."

The Department interprets the phrase (in the context of the present case) to mean an organization that promotes and encourages the sport of running, such as by developing training programs for runners, conducting clinics for runners, certifying high school running coaches, establishing programs to develop young runners for the Junior Olympics, or developing and promoting instructional materials or manuals for runners. In other words, the Department considers an organization qualifying under this rule to be one that is directly involved in developing and supporting a particular sport or group of sports or other activity.[9]

[9]Presumably, this would encompass amateur organizations such as AYSO (American Youth Soccer Association [volunteer organization for recreational youth soccer]) and professional organizations, such as the National Football League (NFL).

What the Department would not include within the definition is an organization that focuses principally on "promoting and marketing products and services." The Department characterizes ACOP as "Chevys' ancillary marketing arm" that helped promote the races and regattas as a marketing vehicle for Chevy's and the other sponsors to increase consumer sales. It is not simply the "for-profit" status of ACOP that disqualifies it, according to the Department, but its primary focus on providing a venue for marketing products and services.

Appellant, in urging the applicability of the rule, attempts to impose definitions on words and phrases that make little or no sense, especially in the context of this rule. To say that ACOP is a "professional organization" because it is a "for profit" corporation, stretches the definitions of the individual words and ignores the context of the two words together and the rule as a whole. A reasonable person reading the words "amateur or professional organization" would interpret the phrase to refer to organizations such as AYSO or the NFL, which promote particular sports by conducting competitions and providing information and education about the activity.

Similarly, a reasonable person would consider "promotion" in this context to mean encouragement of the progress or growth or acceptance of the sport rather than simply providing advertising for a race and its sponsors. The organizations included within the Department's interpretation of the rule would generally be interested in "promotion" of the activity as an end in itself, not as a vehicle for commercial exploitation. Marketing of commercial items, particularly those unrelated to the activity, would be incidental to the activity itself.

In the present case, it would not have made any difference what the activity was that ACOP "promoted"; it happened to be primarily "fun run" races, but for ACOP's

purposes, it could have been anything that would have generated sponsors to provide ACOP with income. The entire purpose of the races put on by ACOP was to generate money for ACOP and the race sponsors, not for the activities of "fun runs" or "bathtub regattas."

The Department's interpretation of rule 106(i)(2) is reasonable and it does not include an organization such as ACOP. Therefore, appellant's sponsorship of the Chevy's events did not comply with rule 106(i)(2).

IV

Appellant contends that the Department has no factual basis for its conclusion that there is good cause to suspend appellant's licenses. It cites *Martin v. Alcoholic Beverage Control Appeals Bd.* (1961) 55 Cal.2d 867, 876 [13 Cal.Rptr. 513], which states: "[the Department's] decision should be based on sufficient evidence and [the Department] should not act arbitrarily in determining what is contrary to public welfare or morals."[10]

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[10]Appellant's quote from *Martin*, *supra*, is taken, out of context, from the court's comments about the discretion to be exercised by the Department. The full quote, omitting internal quotation marks and with italics added, is as follows:

> *[I]f it be conceded that reasonable minds might differ as to whether granting [a license] would or would not be contrary to public welfare, such concession merely shows that the determination of the question falls within the broad area of discretion which the Department was empowered to exercise.* Nevertheless, the discretion to be exercised by the department under section 22 of Article XX of the Constitution is not absolute but must be exercised in accordance with the law, and the provision that it may revoke [or deny] a license for good cause necessarily implies that its decisions should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to public welfare or morals. [Emphasis added.]

We have already reviewed appellant's contentions regarding deficiencies in the evidence and rejected them in the preceding parts of this opinion. Therefore, we have already found that the determinations as to the violations were based on sufficient evidence.

"The determination of whether good cause exists for the . . . suspending . . . of a license is a matter for the discretion of the Department and not the [Appeals] Board or the courts." (*Department of Alcoholic Bev. Control v. Alcoholic Bev. etc. Appeals Bd.* (1981) 118 Cal.App.3d 720, 727 [173 Cal.Rptr. 582].) "'Where the determination of the department is one which could have been made by reasonable people, the appeals board or the courts may not substitute a decision contrary thereto, even though such decision is equally or more reasonable in the premises.'" (*Sepatis v. Alcoholic Bev. etc. Appeals Bd.* (1980) 110 Cal.App.3d 93, 102 [167 Cal.Rptr. 729], quoting *Koss v. Dept. Alcoholic Beverage Control* (1963) 215 Cal.App.2d 489, 496 [30 Cal.Rptr. 219].)

We cannot say that the Department's decision is unreasonable or arbitrary as to either the violations or the good cause for suspending the license.

ORDER

The decision of the Department is affirmed.[11]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[11]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.