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

AB-8203
File: 28-222284 Reg: 01051311

SCHIEFFELIN & SOMERSET COMPANY
2 Park Avenue, New York, NY 10016
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Karl S. Engeman

Appeals Board Hearing: July 8, 2004
San Francisco, CA

ISSUED AUGUST 24, 2004

Schieffelin & Somerset Company (appellant or Schieffelin), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its out-of-state distilled spirits shipper's certificate 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).

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[1]The decision of the Department under Government Code section 11517, subdivision (c), dated October 6, 2003, is set forth in the appendix, as is the proposed decision of the administrative law judge, dated April 3, 2003.

[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.

Appearances on appeal include appellant Schieffelin & Somerset Company, 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.

FACTS AND PROCEDURAL HISTORY

Appellant holds an out-of-state distilled spirits shipper's certificate pursuant to which it distributes Grand Marnier liqueur. The Department issued an accusation charging appellant with violations of sections 25500, subdivision (a)(2) (section 25500(a)(2)), and 25503, subdivision (h) (section 25503(h)) during 1998 and 1999.

An administrative hearing was held on June 18 and 19, 2002, at which time oral and documentary evidence was received. At that hearing, testimony concerning the allegations of the accusation was presented by Nancy Rosolanka, a national accounts sales manager for appellant; Jennifer Miramontes and Jeannine Henderson of A Change of Pace (ACOP); Isaac Gerstenzang and Bruce MacDiarmid of Chevy's, Inc.; and Department investigator Lori Jovovich.

Appellant distributes Grand Marnier liqueur 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, although no written contract was made. Chevy's also provided ACOP with a list of other potential sponsors for 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 events were for the benefit of, and to promote, Chevy's restaurants, but also provided secondary sponsors, such as appellant, with marketing or advertising opportunities. Pursuant to appellant's agreement with ACOP, the Grand Marnier logo, identifying appellant as one of the sponsors of the Chevy's Fresh Mex Races, was included on the thousands of race entry fliers, posters promoting the races, T-shirts worn by participants and volunteers, and "table tents" in appellant's restaurants.

In 1999 there were seven Chevy's events in California, which would mean that Chevy's would owe ACOP $70,000 for 1999. The only documented payments by Chevy's to ACOP in 1999 were two $6,000 payments for races in Sacramento and Chico. Witnesses from Chevy's and ACOP testified that Chevy's made in-kind payments to ACOP, and invoices were produced showing approximately $21,000 in printing costs in 1999 apparently paid by Chevy's for posters, race flyers, and table tents. In addition, memos to a graphic design firm suggest that Chevy's may have paid for the design to be used on the 1999 flyers, posters, and T-shirts. No records were kept documenting the monetary value of these or other alleged in-kind contributions; ACOP and Chevy's would simply "square things up" at the end of the year. Although six events, obligating Chevy's for $60,000, occurred in California in 1998, documentation of charges to or payments by Chevy's in 1998 were not offered in evidence.

Following the hearing, the Department issued its decision which determined that appellant had violated sections 25500(a)(2)[4] and 25503(h).[5] Appellant thereafter filed a timely notice of appeal in which it raises the following issues: (1) Department rule 106(i)(2) (4 Cal. Code Regs., §106, subd. (i)(2)) specifically permits appellant's payments to ACOP; (2) the evidence does not support the conclusion that appellant violated section 25500(a); (3) the evidence does not support the conclusion that appellant violated section 25503(h); and (4) the Department's decision does not establish good cause to suspend appellant's license.

DISCUSSION

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.

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[4]Section 25500(a)(2), 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.

[5]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 its payments to ACOP to sponsor races complied with Department rule 106(i)(2). It argues that ACOP is a bona fide organization which promotes and encourages races, having been involved in approximately 600 race events since its establishment in 1987. The Department refuses to apply rule 106(i)(2), appellant argues, simply because ACOP is a "for-profit" organization, although that restriction does not exist in the rule as written.

The Department appears to interpret "bona fide amateur or professional organizations established for the encouragement and promotion of the activities involved" to mean an organization that is directly involved in developing and supporting a particular sport (or other activity) which participants perform during "the contests, races, tournaments, or other similar activities" which suppliers are allowed to sponsor. In the present case, the Department would consider an organization that promotes and encourages the sport of running to qualify under this rule. Presumably the Department would include under this definition organizations such as the American Running Association,[6] or USA Track and Field (USATF).[7]

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[6] "The American Running Association is a nonprofit membership organization dedicated to supporting runners by providing accurate and non-biased information related to training, nutrition, and injury prevention and treatment. Our programs and services are designed to meet the needs of all runners, whether they are beginners or have been running for years." (<http://www.americanrunning.org/> [as of July 12, 2004].)

[7] "USATF is a volunteer-driven, not-for-profit organization with a staff of professional program administrators at the National Office in Indianapolis. The mission of USATF [is] to provide vision and leadership to the sport of track and field in the United States, and to promote the pursuit of excellence from youth to masters, from grassroots to the Olympic Games." (<http://www.usatf.org/about/> [as of July 12, 2004].)

What the Department would not include 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, rather than on direct encouragement and promotion of the sport of running.

Appellant asserts, however, that the plain language of the rule permits its payments to ACOP, and the Department is attempting to rewrite the rule through its misinterpretation of the rule's wording. The rule, appellant argues, allows suppliers to "sponsor . . . races . . . and other similar activities" by making monetary sponsorship payments "to bona fide amateur or professional organizations established for the encouragement and promotion *of the activities involved*" (emphasis added). The "activities involved," appellant insists, are *races*, not the sport of running. Since ACOP is a professional organization established to promote races, appellant concludes, the sponsorship payments it made to ACOP are clearly within the regulatory language.

While an agency's interpretation of its own regulation is entitled to respect, and this Board previously has deferred to that interpretation,[8] appellant's argument, as articulated in its briefs and at the oral argument, has now convinced us that the Department's interpretation of rule 106(i)(2) is arbitrary and contrary to the plain language of the rule.

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[8]See *Guinness* (2003) AB-7988; *Labatt* (2003) AB-8002.

> It is true that an administrative agency's interpretation of its own regulation is entitled to consideration and respect, especially where, as here, the agency has a special familiarity and expertise with the issues. (*Yamaha Corp. of America v. State Bd. of Equalization* [(1998)] 19 Cal.4th [1] at pp. 7, 11-12.) However, an agency's interpretation of a regulation or statute does not control if an alternative reading is compelled by the plain language of the provision. (*Redding Medical Center v. Bonta* (1999) 75 Cal.App.4th 478, 484 [89 Cal.Rptr.2d 348]; *Motion Picture Studio Teachers & Welfare Workers v. Millan* (1996) 51 Cal.App.4th 1190, 1195 [59 Cal.Rptr.2d 608] [the principle of agency deference "does not permit the agency to disregard the regulation's plain language"].)

(Southern Cal. Edison Co. v. Public Utilities Com. (2000) 85 Cal.App.4th 1086, 1105 [102 Cal.Rptr.2d 684].)

The Department may have intended to restrict qualifying organizations under rule 106(i)(2) to non-profits or to those which promote particular sports rather than more generic "activities," such as contests, tournaments, or races, but it did not accomplish that when it drafted the rule. To use the language of the Court of Appeal in *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Bd*. (1998) 67 Cal.App.4th 575, 580 [79 Cal.Rptr.2d 126],

> We reject the Department's contention that its refusal to apply rule [106(i)(2)] is no more than an exercise of its right to "interpret" a rule governing its enforcement obligations. To ignore a rule and the defense that arises from [a licensee's compliance] with that rule is not a matter of "interpretation.". . . It might as well have said that rule [106(i)(2)] applies on Mondays but not Thursdays."

The "activities involved" were races, not the sport of running; ACOP encouraged and promoted races; therefore, ACOP qualified as an organization to which appellant could permissibly make sponsorship payments. Since appellant's payments to ACOP were permitted by rule 106(i)(2), they were not violative of section 25500(a)(2) or section 25503(h). This conclusion makes unnecessary the consideration of appellant's other arguments.

ORDER

The decision of the Department is reversed.[9]

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

[9]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.