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

AB-8863
File: 21-425687 Reg: 07066343

SHARMEEN'S ENTERPRISES, INC., dba Short Stop # 23
15400 Nordhoff Street, Sepulveda, CA 91343,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: December 3, 2009
Los Angeles, CA

ISSUED APRIL 2, 2010

Sharmeen's Enterprises, Inc., doing business as Short Stop # 23 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for its clerk selling an alcoholic beverage to a person under the age of 21, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Sharmeen's Enterprises, Inc., appearing through its counsel, Ralph B. Saltsman and Jonathan R. Ota, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated March 17, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on June 13, 2005. Subsequently the Department filed an accusation charging that appellant's clerk, Daljeet Litt (the clerk), sold an alcoholic beverage to 20-year-old Lamar Guevara, a non-decoy "minor," on May 9, 2007.

At the administrative hearing held on January 15, 2008, documentary evidence was received, and testimony concerning the sale was presented by Guevara (the minor) and by Detective Joseph Kalyn and Officer Edwin Ayala of the Los Angeles Police Department.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established. Appellant filed an appeal contending (1) the administrative law judge erred in denying appellant's request for bifurcation and continuance of the hearing; (2) items were erroneously admitted into evidence; and (3) the penalty is excessive.

DISCUSSION

I

At the hearing, appellant requested the hearing be bifurcated and continued so that a Punjabi interpreter could be obtained for the testimony of Litt, appellant's clerk. Appellant's counsel stated that she had not attempted to obtain an interpreter until the day before the hearing because she did not know until a few days before the hearing that the clerk would be available to testify. The administrative law judge (ALJ) found that good cause was not shown and denied the request for a continuance and bifurcation.

Appellant contends the ALJ abused his discretion in denying the request because he ignored appellant's explanation of the circumstances. He also ignored the relevance of Litt's testimony, Litt being the only percipient witness available to testify for appellant, and the prejudice to appellant's case arising from not having Litt testify.

Pursuant to Government Code section 11524, the ALJ may grant a request for continuance for good cause. There is no absolute right to a continuance; one is granted or denied at the discretion of the ALJ, and a refusal to grant a continuance will not be disturbed on appeal unless it is shown to be an abuse of discretion. (*Cooper v. Board of Medical Examiners* (1975) 49 Cal.App.3d 931, 944 [123 Cal.Rptr. 563]; *Savoy Club v. Board of Supervisors* (1970) 12 Cal.App.3d 1034, 1038 [91 Cal.Rptr. 198]; *Givens v. Department of Alcoholic Beverage Control* (1959) 176 Cal.App.2d 529, 532 [1 Cal.Rptr. 446].)

The party requesting a continuance must show that good cause exists for granting the request. The Government Code does not specify what constitutes "good cause," but guidance is provided by section 595.4 of the Code of Civil Procedure. That section provides that a request for continuance "on the ground of the absence of evidence" must show "the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it." A party requesting a continuance in order to obtain evidence must show what it expects the evidence to prove. (*Johnson v. Fassett* (1955) 132 Cal.App.2d 871, 873 [283 P.2d 281].) In this case, appellant needed to show that the clerk's testimony would be material and that counsel had used due diligence in attempting to have the clerk testify.

The ALJ denied the request because he did not believe appellant's counsel was reasonably diligent, since she did not attempt to obtain an interpreter until the day

before the hearing. Counsel did not indicate that more than one interpreting service was contacted. She said at first that her firm didn't know the clerk would be available until the day before the hearing, but later, in response to the ALJ'S question, "When were you first made aware that he would be back in time for today's hearing?" she said, "I believe our office was trying to make arrangements towards the end of last week. Thursday, Friday of last week. Friday of last week." [RT 12] Her responses to the ALJ'S questions were somewhat vague and could be characterized as evasive. In any case, Litt was not present at the hearing, so the ALJ was not able to determine if an interpreter would really be necessary for the clerk's testimony.

Under the circumstances, we cannot say that the ALJ abused his discretion in denying appellant's request for a continuance and bifurcation.

II

Appellant contends that the containers of alcoholic beverages purchased by the minor were not properly accepted into evidence because the Department failed to establish a continuous chain of custody. The items were marked exhibits 1 through 3 and consisted of Mickey's Malt Liquor, Sparks Light malt beverage, and Captain Morgan rum.

Again, the ALJ has broad discretion to determine the admissibility of evidence. Here, the gaps in the chain of custody were not such as to raise any serious questions of tampering with the evidence. Appellant has merely speculated about the possibility, or just the opportunity, for alteration of the evidence without the slightest bit of evidence about what the nature of the alteration might be, or even that tampering actually occurred.

In any case, even if it were error to admit the exhibits, appellant has not shown it was prejudiced by having them admitted as evidence. The minor testified that he had gone to appellant's store to purchase alcoholic beverages, and he indicated that exhibits 1, 2, and 3 were what he had purchased, so the purchase of alcoholic beverages was established even if they had not been admitted.

Decisions of the Department will not be reversed for merely procedural error, such as erroneously admitting nonprejudicial items into evidence, unless " 'the error complained of has resulted in a miscarriage of justice.' (Cal. Const., art. VI, § 13.)" (*Reimel v. House* (1969) 268 Cal.App.2d 780, 787 [74 Cal.Rptr. 345].) Additionally, "[e]rror alone . . . does not warrant reversal. 'The burden is on the appellant, not alone to show error, but to show injury from the error.' (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 325, p. 335, italics omitted.)" (*Robbins v. L.A. Unified Sch. Dist*. (1992) 3 Cal.App.4th 313, 318 [4 Cal.Rptr.2d 649].)

Appellant has not shown any injury from this purported error.

III

Appellant complains that the 15-day suspension imposed was an abuse of discretion resulting from the ALJ'S failure to consider mitigating circumstances presented by appellant. Appellant points out the ALJ'S statement, in the third paragraph of the section "On Penalty": "No evidence of mitigation, extenuation or rehabilitation was introduced with the [*sic*] respect to the violation." On the contrary, appellant contends, it presented testimony about the training provided to employees and the use of a "secret shopper" service, and counsel noted in her closing statement that the minor was 20½ years of age at the time of the illegal sale.

It is true that testimony was presented about training and policies, and these could be considered mitigating factors. However, the ALJ uses his discretion in giving the appropriate weight to any such factors. In this case, he obviously did not consider the factors sufficient to justify a reduction in penalty. This is not entirely surprising, since every prudent licensee would be expected to provide some type of training in the sale of alcoholic beverages.

We cannot say that a standard 15-day penalty is unreasonable.

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.