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

AB-8910
File: 20-393176 Reg: 08067939

7-ELEVEN, INC., and GHUMAN & SONS, INC., dba 7-Eleven Store # 2172 13766G
5511 Westminster Avenue, Westminster, CA 92683,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: November 4, 2010
Los Angeles, CA

ISSUED DECEMBER 9, 2010

7-Eleven, Inc., and Ghuman & Sons, Inc., doing business as 7-Eleven Store # 2172 13766G (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days, with 10 of those days conditionally stayed, for their clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Ghuman & Sons, Inc., appearing through their counsel, Ryan M. Kroll, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

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

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on January 15, 2003. On February 13, 2008, the Department filed an accusation against appellants charging that, on September 13, 2007, appellants' clerk sold an alcoholic beverage to 19-year-old Adrianne DiLeva. Although not noted in the accusation, DiLeva was working as a minor decoy for the Westminster Police Department at the time.

At the administrative hearing held on June 26, 2008, documentary evidence was received and testimony concerning the sale was presented by DiLeva (the decoy) and by Tim Walker, a Westminster police detective. Mohinderpal Ghuman testified regarding appellants' licensing and employee training.

The Department's decision determined that the violation charged was proved and no defense to the charge was established. Appellants then filed an appeal contending that the administrative law judge (ALJ) erred by precluding introduction of evidence demonstrating that the Department used an illegal underground regulation in determining the penalty.

DISCUSSION

Appellants contend that the ALJ erroneously quashed the subpoena they served on District Administrator Dan Hart, preventing his testimony regarding the Department's use of prohibited underground regulations in determining disciplinary penalties. Quashing the subpoena was error, appellants argue, because the ALJ's analysis was "wholly without merit and meaning" (App. Br. at p.8), the District Administrator's testimony is relevant to the issue of underground regulations, and the testimony would have established that the Department's penalty recommendation was made "pursuant to

a structured systemic protocol" that constitutes a prohibited underground regulation. This alleged error, appellants assert, requires that the Appeals Board reverse the decision of the Department.

At the hearing, appellants provided a written offer of proof stating what they alleged would be the District Administrator's testimony. The District Administrator would testify, according to the offer, that the Department has a policy in which the length of discipline-free licensure affects the penalty recommended and that this policy has not been adopted as a regulation in compliance with the Administrative Procedure Act (Gov. Code, §§ 11340-11529). Specifically, the District Administrator's testimony would show that, pursuant to this policy, less than 5 years of discipline-free operation will result in a 15-day penalty for a first sale-to-minor violation, that 5 to 8 years of discipline-free operation will result in a 10-day penalty, and at least 8 years of discipline-free operation will result in a 10-day suspension with all 10 days conditionally stayed.

The Department moved to quash the subpoena. The ALJ stated that the District Administrator only made a recommendation as to penalty and his testimony would not be helpful; any penalty the ALJ proposed would be based on the Department's penalty guidelines in rule 144[2] and the evidence and arguments presented at the hearing. On that basis, he quashed the subpoena.

The issue raised by appellants in this appeal, however, is not whether the District Administrator's testimony would be helpful to the ALJ in making his penalty recommendation. The question is whether it was error for the ALJ to preclude appellants from presenting testimony that they alleged would show that the Department

[2]California Code of Regulations, title 4, section 144.

based its penalty determination on an illegal underground regulation.[3] We conclude it was not error.

Government Code section 11340.5, subdivision (a) provides:

> No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation . . . .

Section 11342.600 defines "regulation" as "every rule, regulation, order, or standard of general application . . . adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." The "two principal identifying characteristics" of a regulation are that the rule "appl[ies] generally, rather than in a specific case," and it "must 'implement, interpret, or make specific the law enforced or administered by [the agency], or . . . govern [the agency's] procedure.' " (*California Advocates for Nursing Home Reform v. Bonta* (2003) 106 Cal.App.4th 498, 507 [130 Cal.Rptr.2d 823].)

The offer of proof speaks only of this District Administrator being aware of a policy of the Department regarding the relationship between the length of discipline-free licensure and the District Administrator's recommended penalty. There is no explanation of how the District Administrator became aware of the policy or whether it is a

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[3]Unless there is a clear abuse of discretion, the ALJ's reasons for quashing the subpoena are really of no consequence; the Appeals Board reviews Department decisions for their results, not their reasons. (See, e.g., *Davey v. Southern Pacific Co*. (1897) 116 Cal. 325, 329-330 [48 P. 117]; *Coastside Fishing Club v. California Resources Agency* (2008) 158 Cal.App.4th 1183, 1191 [71 Cal.Rptr.3d 87]*; Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 980–981 [35 Cal.Rptr.2d 669, 884 P.2d 126].) Appellants have not shown an abuse of discretion, so the Board must decide whether or not the subpoena was properly quashed, for whatever reason.

Department-wide policy. The Department has more than 20 districts, and the use of a particular method in one or even several districts does not make that method a standard of general application.

An underground regulation is determined by an agency-wide practice set by agency-wide policymakers. (Gov. Code, § 11342.600 [a rule must be "adopted by [a] state agency" to be a regulation].) This offer of proof, even if it accurately reflected what the District Administrator's testimony would be, would not establish the existence of a Departmental underground regulation. The ALJ was entitled to exclude this evidence, as its probative value would undoubtedly be outweighed by the undue consumption of time. (Gov. Code, § 11513, subd. (f); Code Civ. Proc., § 352.)

ORDER

The decision of the Department is affirmed.[4]

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

[4]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.