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

AB-8950
File: 21-406522 Reg: 08068052

YUMMY FOODS LLC, dba Yummy
1308 Pico Boulevard, Santa Monica, CA 90405,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

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

ISSUED JULY 22, 2010

Yummy Foods LLC, doing business as Yummy (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 25 days for its clerk selling an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Yummy Foods LLC, appearing through its counsel, Ralph B. Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

[1]The decision of the Department, dated September 16, 2008, is set forth in the appendix.

Appellant's off-sale general license was issued on November 25, 2003. On February 28, 2008, the Department filed an accusation charging that appellant's clerk sold an alcoholic beverage to 19-year-old Jose Rios on October 30, 2007. Rios was working as a minor decoy for the Department at the time.

At the administrative hearing held on July 11, 2008, documentary evidence was received and testimony concerning the sale was presented by Rios (the decoy) and by Department investigator Ricardo Carnet. The Department moved to quash the subpoena served on the Department's District Administrator, Karemeon Waddell-Peterson. The administrative law judge (ALJ) quashed the subpoena. Appellant presented no witnesses.

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 that by erroneously quashing the subpoena the ALJ precluded the introduction of evidence showing the Department's use of prohibited underground regulations. Appellant has not challenged the substantive correctness of the decision.

DISCUSSION

Appellant contends the ALJ erroneously quashed the subpoena appellant served on District Administrator Waddell-Peterson, preventing her testimony regarding the Department's use of prohibited underground regulations in determining disciplinary penalties. Quashing the subpoena was error, appellant argues, because the ALJ's stated reasons for doing so were "wholly without merit and meaning," the District Administrator's testimony is relevant to the issue of underground regulations, and the Department's "protocol" within the lawfully promulgated rule 144 (4 Cal. Code Regs., § 144) is an underground regulation.

At the hearing, appellant's counsel represented to the ALJ that the argument in

support of the District Administrator's testimony was the same as counsel had made in many cases previously and that "only the names and dates ha[d] been changed." [RT 7.] Appellant's counsel said no more on the subject at the hearing, but provided a written offer of proof and a brief regarding Peterson's testimony. The ALJ quashed the subpoena saying, "I don't find that her testimony would be useful."[2] [RT 8.] [3]

In a number of prior appeals, appellant's counsel has attempted to have a District Administrator testify regarding penalty determinations. As far as this Board can tell, the recent appeal of *Garfield Beach* (2009) AB-8725, is representative of such appeals. In *Garfield Beach*, the appellant requested a continuance because the District Administrator, who was served with a subpoena, was not present at the hearing. The appellant made an offer of proof that the District Administrator "could provide explanation and insight into the Department's suggested penalty in this matter, as well as speak to any salient facts which might justify any deviation from the suggested penalty set forth in the Department's Penalty Guidelines (4 Cal. Code Regs., §144)."

The ALJ denied the request in *Garfield Beach* on the ground that the testimony

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[2]We can find no statement by the ALJ that comes close to appellant's assertion that the ALJ "stated, on the record, that it would be a complete waste of his time to listen to Ms. Waddell-Peterson's testimony." (App. Br. at p. 8.)

[3]In the Department's decision, the ALJ addressed in footnote 2 appellant's attempt to present the District Administrator's testimony:

> Respondent sought to present District Administrator Karemeon J. Peterson as a witness in order to inquire as to her development of the discipline recommended in this action and to establish the existence of an underground regulation regarding penalty recommendations in general. (*See* Exhibit A.) The ALJ quashed Respondent's subpoena and did not permit the inquiry since (1) Complainant's recommendation made at hearing is just that, a recommendation, (2) Rule 144, (3) the evidence presented at hearing, and (4) the argument the parties provide at hearing are all the ALJ needs to develop an appropriate sanction in compliance with Rule 144.

offered would not be relevant. This Board agreed, saying:

> It appears to be the case that the District Administrator advises the attorney charged with litigating the case of the penalty the attorney is to recommend to an ALJ. Of course, an ALJ is not bound by the Department's recommendation made at the hearing, and may depart from the Penalty Schedule in Rule 144 if the evidence warrants such.
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> We do not see how the District Administrator's view, prior to any hearing, as to what would be an appropriate penalty has any meaningful bearing on what penalty an ALJ chooses to recommend after a hearing. The ALJ hears evidence developed in an adversary setting, where a licensee has the opportunity to argue why the evidence supports a departure from the penalty urged by Department counsel, or where the Department may argue for an aggravated penalty under the same penalty guidelines. The ALJ is not bound by the Department's suggestion, and, we know from the many cases we have heard, an ALJ often imposes a penalty more lenient than the Department has urged. ¶ . . . [W]e see little or no relevance in an ALJ knowing what the District Administrator might seek in the way of a suspension to settle a charge before the filing an accusation. An ALJ relies on an objective assessment of the evidence after listening to testimony and the partisan appeals of counsel, and ultimately is guided by that assessment and the Penalty Schedule of Rule 144, including its criteria for aggravated or mitigated penalties.
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> Injecting the pre-hearing views of a District Administrator would, in our opinion, only serve to add delay.

Contrary to appellant's representation to the ALJ at the administrative hearing, this appeal presents an altogether different argument than that made in prior cases like *Garfield Beach*, *supra*. In those cases, the appellants argued that the testimony would provide information to the ALJ about how and why the District Administrator arrived at the Department's penalty recommendation. Appellant here argues that the testimony would show the District Administrator's penalty recommendation was based on an invalid underground regulation which, it asserts, would require dismissal of the accusation or mitigation of the penalty. Appellant declares that it was denied "a significant aspect of due process" (App. Br. at p. 14) when it was prevented from presenting this evidence.

The question presented to us in the present appeal is not whether the District

Administrator's testimony would be helpful to the ALJ in making his penalty recommendation, but whether it was error for the ALJ to preclude testimony that appellant contends would provide it with some kind of defense.[4] We believe it was not error.

Appellant predicates its "underground regulation defense" on Government Code section 11340.5 which provides in pertinent part:

> 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].)

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[4]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., *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]; *Davey v. Southern Pacific Co*. (1897) 116 Cal. 325, 329-330 [48 P. 117].) Appellant has not shown an abuse of discretion, so the Board must decide whether or not the subpoena was properly quashed, for whatever reason.

Appellant's offer of proof, however, 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 department-wide policy. While the offer of proof indicates this District Administrator knows of other District Administrators who know of and use this policy, it does not indicate whether she speaks of two other District Administrators or ten. 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 reflects 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.)

We also believe the testimony of the District Administrator would not establish that the Department "issue[d], utilize[d], enforce[d], or attempt[ed] to enforce" the alleged underground regulation in violation of Government Code section 11340.5. Nothing in the offer of proof establishes that the Department issued the alleged underground regulation, nor does it establish that the Department utilized, enforced, or attempted to enforce the alleged underground regulation in this case.

The alleged underground regulation involves mitigation of penalty based on years of discipline-free operation. Appellant did not assert it was entitled to such

mitigation, nor could it. Far from having a history of discipline-free operation, appellant violated the same sale-to-minor statute less than two years before the violation that is the subject of this appeal. In addition, that prior violation occurred within the two years after appellant obtained its license. Even if we were to assume, for the sake of argument, that the Department had such a protocol for determining the penalty to recommend and/or impose, as alleged by appellant, it would have no application under the facts of this case and could not be utilized.

We conclude that the proffered testimony of the District Administrator would do nothing to show that the alleged underground regulation existed or that the Department issued, used, enforced, or attempted to enforce the alleged underground regulation in this case. The testimony was properly excluded by quashing the subpoena.[5]

ORDER

The decision of the Department is affirmed.[6]

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

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[5] Appellant asserts that it was "ready willing and able to demonstrate the existence of an underground regulation which would have had the effect of either requiring the dismissal of the underlying accusation or from [*sic*; from?] a penalty mitigation." (App. Br. at p. 13.) We note that the remedy, if an underground regulation had been shown to exist, would almost certainly not be dismissal of the accusation or mitigation of the penalty (see *In re Ronje* (2009) 179 Cal.App.4th 509, 519 [101 Cal.Rptr.3d 689]), but remand to the Department to allow it to properly adopt the protocol as a regulation, or, more likely, to impose the penalty without use of the underground regulation, which, of course, is what the Department has done here.

[6] 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.