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

AB-8973
File: 21-446237 Reg: 08068853

JASPAL KAUR RANDHAWA and PARMJIT RANDHAWA, dba Lakeshore Gas Mart
16851 ½ Lakeshore Drive, Lake Elsinore, CA 92530,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: February 4,
2010 Los Angeles, CA
ISSUED MAY 19, 2010

Jaspal Kaur Randhawa and Parmjit Randhawa, doing business as Lake Shore Gas Mart (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk, Brenda Contla, having sold a six-pack of Coors Light beer, an alcoholic beverage, to Vanessa Castellon, a 19-year-old Riverside Sheriff's Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Jaspal Kaur Randhawa and Parmjit Randhawa, appearing through their counsel, Ralph B. Saltsman, 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 November 14, 2008, is set forth in the appendix.

PROCEDURAL HISTORY

Appellants' off-sale general license was issued on November 9, 2006. Thereafter, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a person under the age of 21.

An administrative hearing was held on September 23, 2008, at which time documentary evidence was received and testimony concerning the violation charged was presented.

Subsequent to the hearing, the Department issued its decision which determined that the violation occurred as alleged in the accusation.

Appellants filed a timely notice of appeal in which they contend that they were precluded from introducing evidence to show that the Department utilized an underground regulation in its assignment of penalties. They have not challenged the correctness of the decision.

DISCUSSION

Appellant contends the ALJ prevented the testimony of District Administrator Clark regarding the Department's use of prohibited underground regulations in determining disciplinary penalties by erroneously quashing the subpoena appellant served on Clark. 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.

The Department's attorney, Mr. Sakamoto, opposed having the District Administrator testify, mainly based on the ground that his testimony would not be

helpful to the Court in terms of assessing the appropriate penalty. . . . "It would not be relevant evidence and, therefore, the subpoena to him ought to be quashed." [*Id*. at 7-8.]

After Mr. Akopyan acknowledged that his arguments would be the same as those made in prior cases, the ALJ stated [RT 8-9]:

> The Court: Okay. All right. Mr. Clark's appearance here today is not going to benefit me in any way, shape, or form. As a matter of fact, it's probably going to be a complete waste of my time.
>
> The Respondent requested a hearing on this particular Accusation. If, in fact, this Accusation is sustained, a determination will be made by me as to a recommended penalty if, in fact, it is sustained, and my recommendation regarding the penalty will not be based on anything Mr. Clark has said in the past; it will be based upon my interpretation of Rule 144 and any mitigating evidence you should present here today, Mr. Akopyan, and any aggravating evidence that may be presented by the Department, and it is my recommendation that will go forward to the Director for his ultimate approval.
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> So as I said, Mr. Clark's appearance here before me today would be a complete waste of our time, especially my time. I'm going to grant the motion to quash the subpoena. I'm not going to require Mr. Clark to be here, and I'm going to deny the request for a continuance in this matter.

An example of the arguments the ALJ adverted to may be found in the appeal of *Garfield Beach* (2009) AB-8725. 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 on the ground that the testimony 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.

The present appeal appears to present a somewhat different issue than was involved in prior cases like *Garfield Beach*, *supra*. Appellant here argues that the testimony would show the District Administrator's penalty recommendation was based on an invalid underground regulation, which would require dismissal of the accusation or mitigation of the penalty. Since appellant was prevented from presenting this evidence, it asserts that it was denied "a significant aspect of due process." [App. Br. at p. 14.]

Because the question in the present appeal is somewhat different from that in prior appeals, the answer must also be somewhat different. The question 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.[2] We believe it was not error.

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

> [n]o state agency shall . . . utilize . . . 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].)

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

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[2]Whether or not the ALJ's reasons for quashing the subpoena were correct is really of no consequence; the Appeals Board reviews Department decisions for the result, not the reason. The Board must decide whether or not the subpoena was properly quashed, for whatever reason.

does not indicate whether he 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. 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 that the testimony of the District Administrator would not establish that Department "utilized" the standard alleged by appellant to the extent that it resulted in a violation of Government Code section 11340.5. As noted in appeals such as *Garfield Beach*, *supra*, the District Administrator makes only a recommendation that is presented to the ALJ at the end of a hearing, which the ALJ may or may not follow. The ALJ in this case proposed the same penalty as that recommended by the District Administrator through the Department's counsel at the hearing, but did so on the basis of rule 144 and the evidence and arguments presented at the hearing. In such a case, we do not believe that the Department used whatever standard was used by the District Administrator when the Department adopted the penalty proposed by the ALJ. This is particularly true since the penalty adopted is the penalty set out in rule 144 for this violation. The testimony of the District Administrator would do nothing to show that the Department "utilized" an underground regulation, even if one had been found to exist. The testimony was properly excluded.

ORDER

The decision of the Department is affirmed.[3]

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

[3] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.