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

AB-8974
File: 20-256188 Reg: 08068723

CHEVRON STATIONS, INC., dba Chevron Station # 1447
18451 Dexter Avenue, Lake Elsinore, CA 92532,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: August 5, 2010
Los Angeles, CA

ISSUED SEPTEMBER 21, 2010

Chevron Stations, Inc., doing business as Chevron Station # 1447 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 10 days, all stayed on the condition that appellant successfully complete a one-year probationary period, for its 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 appellant Chevron Stations, Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

---

[1]The decision of the Department, dated November 14, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on January 24, 1991. On May 21, 2008, the Department filed an accusation charging that appellant's clerk sold an alcoholic beverage to 19-year-old Vanessa Castellon on March 26, 2008. Although not noted in the accusation, Castellon was working as a minor decoy for the Riverside Sheriff's Department at the time.

At the administrative hearing held on September 23, 2008, documentary evidence was received, and testimony concerning the sale was presented by Castellon (the decoy) and by Karen Pico, a Riverside Sheriff's deputy. Also, the administrative law judge (ALJ) granted the Department's motion to quash a subpoena served by appellant on the Department's District Administrator.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no affirmative defense was established.

Appellant filed an appeal contending that the ALJ erroneously excluded evidence showing the Department used a prohibited underground regulation to determine the penalty.

DISCUSSION

Appellant contends that the ALJ erroneously quashed the subpoena it served on District Administrator Clark, preventing his 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" (App. Br. at p.8), 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. This alleged error, appellant asserts, requires that the Appeals Board reverse the decision of the Department.

At the hearing, appellant requested a continuance because the Department's District Administrator, although subpoenaed by appellant, had not appeared to testify. Appellant provided a written offer of proof regarding the District Administrator's testimony and a brief arguing why the testimony was necessary.

The offer of proof contained what appellant said would be the substance of the District Administrator's testimony. It represented that the District Administrator would testify 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 in compliance with the Administrative Procedure Act (Gov. Code, §§ 11340-11529). Specifically, the District Administrator would testify that, according to the policy, 5 to 8 years of discipline-free operation would result in a penalty of 10 days' suspension for a sale-to-minor violation, rather than the standard 15 days, and at least 8 years of discipline-free operation would result in a penalty of 10 days' suspension with all 10 days stayed for one year.

The Department moved to quash the subpoena on the ground that the District Administrator's testimony about the penalty recommendation would not be relevant to the ALJ's consideration of the appropriate penalty to propose. The ALJ agreed and quashed the subpoena.

The question presented in this appeal, however, is not whether the District Administrator's testimony would be helpful to the ALJ in making his penalty recommendation, but whether it was error to preclude testimony showing, according to

appellant, that the Department based its penalty determination on an illegal underground regulation.[2] 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

---

[2]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].) Appellant has not shown an abuse of discretion, so the Board must decide whether or not the subpoena was properly quashed, for whatever reason.

a 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.[3]

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

[3]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.