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

AB-8991
File: 21-237802 Reg: 08069140

7-ELEVEN, INC., MICHAEL S. WONG, and YET-FONG WONG,
dba 7-Eleven No. 2111-21786
263 East Grand Avenue, Escondido, CA 92025,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: May 6, 2010
Los Angeles, CA
ISSUED AUGUST 18, 2010

7-Eleven, Inc., Michael S. Wong, and Yet-Fong Wong, doing business as 7-Eleven No. 2111-21786 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for each of three violations, the suspensions to run concurrently, with 7 days of the suspension conditionally stayed during a probationary period of 1 year, for their clerk selling or furnishing alcoholic beverages to three persons under the age of 21, violations of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Michael S. Wong, and Yet-Fong Wong, appearing through their counsel, Ralph B. Saltsman and Michael Akopyan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

---

[1]The decision of the Department, dated December 12, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on October 13, 1989. The Department filed an accusation against appellants charging that appellants' clerk sold alcoholic beverages to three 19-year-olds (collectively referred to herein as "the minors") on May 8, 2008.

At the administrative hearing held on October 22, 2008, documentary evidence was received and testimony concerning the sale was presented by two Department investigators, the clerk, and the three minors. Co-appellant Michael Wong testified as to appellants' policies, procedures, and employee training for alcoholic beverage sales.

The Department's decision determined that the violations charged were proved and no defense to the charges was established. Appellants then filed an appeal contending that the administrative law judge (ALJ) precluded the introduction of evidence showing the Department's use of prohibited underground regulations. Appellants have not challenged the substantive correctness of the decision.

DISCUSSION

Appellants contend that the ALJ erroneously quashed the subpoena they served on District Administrator Robin Van Dyke, preventing her testimony regarding the Department's alleged use of prohibited underground regulations in determining disciplinary penalties. Quashing the subpoena was error, appellants argue, because the ALJ's stated reasons for doing so were "wholly without merit and meaning," the District Administrator's testimony was 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, appellants requested a continuance because the Department's District Administrator, although subpoenaed by appellants, had not appeared to testify.

Appellants 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 appellants 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 determining his proposed penalty, but whether it was error to preclude testimony showing, according to appellants, that the Department based its penalty recommendation on an illegal underground regulation.[2] We conclude it was not error.

---

[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*

(continued...)

Government Code section 11340.5 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].)

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 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.

---

[2](...continued)
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.

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.)

We also believe that 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 the offer of proof establish that the Department utilized, enforced, or attempted to enforce the alleged underground regulation in this case. The alleged underground regulation, according to the offer of proof, would dictate a penalty of 10 days' suspension, all stayed conditioned on the successful completion of a 1-year probationary period. At the hearing, the Department recommended a penalty of 15 days' suspension, the standard penalty established in rule 144. The ALJ proposed a penalty of 15 days for each of the 3 violations, the suspensions to run concurrently, but also acknowledged appellants' almost 11 years of discipline-free operation before this violation and stayed 7 days of the suspension, conditioned on successful completion of a 1-year probationary period. The Department adopted the penalty proposed by the ALJ. Neither the Department's recommended penalty at the hearing, the ALJ's proposed penalty, nor the penalty actually imposed provide any support for the existence of the alleged underground regulation.

We conclude that the proffered testimony of the District Administrator would not show that an 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.

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.