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

AB-9019
File: 20-293674 Reg: 08069031

7-ELEVEN, INC., and YOGENDRA and SANGITA SOLANKI, dba 7-Eleven 2133 13932
2331 Chester Lane, Bakersfield, CA 93304,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: May 6, 2010
Los Angeles, CA

ISSUED AUGUST 9, 2010

7-Eleven, Inc., and Yogendra and Sangita Solanki, doing business as 7-Eleven 2133 13932 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days 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 Yogendra and Sangita Solanki, 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 under Government Code section 11517, subdivision (c), dated April 15, 2009, is set forth in the appendix, as is the Proposed Decision of the administrative law judge, dated November 14, 2008.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on April 4, 1994. On June 18, 2008, the Department filed an accusation against appellants charging that appellants' clerk, Amarjit Singh (the clerk), sold an alcoholic beverage to 17-year-old James Moore on February 9, 2008. Although not noted in the accusation, Moore was working as a minor decoy for the Bakersfield Police Department at the time.

At the administrative hearing held on October 21, 2008, documentary evidence was received and testimony concerning the sale was presented by Moore (the decoy); by Dennis Murphy, a Bakersfield police officer; and by the clerk, Singh. Co-licensee Yogendra Solanki testified about rules and procedures used at the premises to prevent sales to minors.

The administrative law judge (ALJ) prepared a proposed decision dismissing the accusation because the decoy failed to respond when the clerk muttered "ID," which the ALJ decided was a violation of rule 141(b)(3). (4 Cal. Code Regs., § 141, subd. (b)(3).) The Department rejected the ALJ's proposed decision and decided the matter itself pursuant to Government Code section 11517, subdivision (c). The Department adopted all the Findings of Fact and the first six Conclusions of Law (CL) of the proposed decision in full. Then it made three new Conclusions of Law (CL 7-9), concluded rule 141 was not violated, and ordered the license suspended for 10 days.

Appellants have filed an appeal contending: (1) The Department does not identify the evidence relied on to determine credibility, and (2) the ALJ unlawfully precluded introduction of evidence demonstrating the Department's violation of prohibitions against "underground regulations."

DISCUSSION

I

Appellants contend that the Department's decision found that "clerk Singh for the most part is not found credible" (CL 7), without explaining how it "determine[d] credibility differently from the Administrative Law Judge when it was the Administrative Law Judge who could observe the witness during testimony." (App. Br. at p. 10.) Appellants go on to argue that great deference must be given to credibility determinations made by triers of fact, like the ALJ, who have the opportunity to observe the demeanor of witnesses; where the agency rejects that determination, appellants argue, it must "provide specifics as to how it arrived at a credibility decision at odds with the determination reached by the Administrative Law Judge." (*Id*. at p. 12.)

The problem with appellants' argument is that the Department did ***not*** make a credibility determination different from the one made by the ALJ.

The Department adopted CL 1 through 6 in their entirety and wrote new CL 7 through 9. However, the Department used the first six sentences of CL 7 of the ALJ's proposed decision exactly as he had written them:

> Respondents argued there was a failure to comply with sections 141(b)(3) and (b)(4) based on the testimony of clerk Singh. Therefore, Rule 141(c) applies and the Accusation must be dismissed. If the testimony of clerk Singh were credible, Respondents['] contention would be correct. *However, clerk Singh for the most part is not found credible.* His story about decoy Moore resembling a regular customer until he raised his head late in the transaction is not believed. Much more likely is that clerk Singh was distracted by his ongoing conversation with the female friend. (Italics added.)

Obviously, it was the ALJ who determined the clerk was not credible; the Department simply adopted his credibility determination, word for word. There is no issue here to discuss.

II

Appellants contend that the ALJ erroneously quashed the subpoena they served on District Administrator Gonzalez, 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 stated reasons for doing so were "wholly without merit and meaning" (App. Br. at p.16), 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, 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 making his penalty recommendation, 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.

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,

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[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., *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]; *Coastside Fishing Club v. California Resources Agency* (2008) 158 Cal.App.4th 1183, 1191 [71 Cal.Rptr.3d 87].) Appellant has not shown an abuse of discretion, so the Board must decide whether or not the subpoena was properly quashed, for whatever reason.

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.

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. In its decision, the Department acknowledged appellants' 12 years of discipline-free operation before this violation and suspended the license for 10 days. Neither the Department's penalty recommendation at the hearing 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

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[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.