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

AB-7711

File: 20-214593 Reg: 00048434

7-ELEVEN, INC., HONG I. KIM, and SOOK Y. KIM dba 7-Eleven Food Store #20166
550 Knott Avenue, Anaheim, CA 92804,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: August 17, 2001
Los Angeles, CA

ISSUED OCTOBER 29, 2001

7-Eleven, Inc., Hong I. Kim, and Sook Y. Kim, doing business as 7-Eleven Food Store # 20166 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 16 days for their clerk, Tae Bin Yun, having sold an alcoholic beverage (a six-pack of Budweiser beer) to Katie McGranahan, a minor, contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Hong I. Kim, and Sook Y. Kim, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Michele L. Wong.

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[1]The decision of the Department, dated September 21, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on August 22, 1980. Thereafter, the Department instituted an accusation against appellants charging that appellant's clerk sold an alcoholic beverage to a minor, in violation of Business and Professions Code §25658, subdivision (a). Although not stated in the accusation, the minor was acting as a decoy for the Anaheim Police Department.

An administrative hearing was held on July 13, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Katie McGranahan ("the decoy") and Richard Trujillo, an Anaheim police officer, concerning the charge of the accusation. Appellants presented no witnesses.

Subsequent to the hearing, the Department issued its decision which determined that the unlawful sale had occurred as alleged, and ordered a 16-day suspension.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) the penalty constitutes an abuse of discretion; and (2) the decoy did not present the appearance required by Rule 141(b)(2).

DISCUSSION

I

At the close of the hearing, Department counsel recommended that a fifteen-day suspension be imposed, a penalty the Administrative Law Judge (ALJ) acknowledged was a "routinely recommended first-offense suspension for the sort of violation found here."

Business and Professions Code §23095 affords a licensee the opportunity to petition the Department to accept a fine in lieu of being required to serve the

suspension. The Department may grant such a petition if, upon investigation, it is satisfied that the public welfare and morals would not be impaired by permitting the licensee to operate during the period set for suspension, and if the licensee's books and records are such that the loss of sales of alcoholic beverages that the licensee would have suffered had the suspension gone into effect could be determined with reasonable accuracy.

However, §23095 is available only if the suspension is for 15 days or less. Thus, as appellants point out, the imposition of a sixteen-day suspension automatically deprives them of the opportunity to file a petition under that section. Appellants contend that this "vindictive departure" from the standard fifteen-day suspension was "carefully crafted" to take the case out of the reach of that section.

Appellants assert, in effect, that the ALJ intended to punish them because they had, in their Special Notice of Defense, contended that the Department's standard 15-day penalty was the product of an underground regulation. Indeed, in its brief to the Appeals Board, the Department explains the ALJ's upward departure from its recommendation as "due to what he perceived is a bad faith argument regarding an 'underground regulation.'" [Dept. Br., page 5.]

The statutory provisions dealing with "underground regulations" are found in Government Code §11340.5, subdivision (a), and §11342.600. Section 11340.5, subdivision (a)[2], provides:

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[2] This section was amended by Stats. 2000, c. 1060 (A.B.1822), §3, to correct references to the definition of "regulation" in former §11342, subdivision (g), which was continued in §11342.600, as noted below (ftnt. 3). The Law Revision Commission Comments state, in relevant part: "Amendment of this section is not intended to ratify or abrogate the opinion in Tidewater Marine Western, Inc. v. Bradshaw, 14 Cal.4th 557,

> "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 and filed with the Secretary of State pursuant to this chapter."

Section 11342.600[3] provides:

> "'Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure."

Although appellants' attorneys raised this "underground regulation" issue in their Special Notice of Defense, the first pleading appellants filed in response to the Department accusation, no evidence bearing on the issue was offered, and appellants' counsel made no reference to this defense throughout the course of the hearing, even after hearing the Department's recommendation. Ordinarily, this would be enough to say that the issue had been waived. The ALJ, however, did not treat it as waived:

> "Respondents, in paragraph 8 of their Special Notice of Defense, objected to the penalty recommendations on the basis that the Department promulgates penalties using a schedule which respondents contend is an 'underground regulation.' First, no evidence was presented that the penalty recommendation is in any fashion the result of an 'underground regulation,' only respondent's bare assertion that it is. Further, respondents' counsel and law-firm colleagues have appeared before this court too many times to count on similar matters with similarly situated clients. With no showing that complainant/Department's penalty recommendation in this case differs in any respect from recommendations given countless times in the past, one wonders why this objection is now being raised for the first time. It smacks of bad faith.

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927 P.2d 296, 59 Cal.Rptr.2d 186 (1996)."

[3] Added by Statutes 2000, chapter 1060 (A.B. 1822), §8. The new section continues, with one change, former Government Code §11342, subdivision (g). The only change is the omission of the concluding phrase of the former subdivision: "except one that relates only to the internal management of the agency."

> "However, out of an abundance of caution and without determining that the recommended 15-day suspension is the product of a prohibited underground regulation, the Order which follows [a 16-day suspension] will not be the result of blind adherence to such a 'regulation.' "

This Board is not so naive as to assume that the administrative law judges in general, or this ALJ in particular, are unaware of the impact of a suspension greater than 15 days on the ability to petition for a fine in lieu of suspension. Moreover, we have little doubt that, in this case, the ALJ was aware of the implications of a 16-day suspension in the context of §23095, and intended to preclude the filing of a §23095 petition. The issue, as we see it, is whether he abused his discretion in doing so. As we shall explain, we believe that he did, and the penalty must be reversed.

The only reason the ALJ gave for not adopting the Department's recommendation was his desire to act "out of an abundance of caution" and not in "blind adherence to such a regulation." As laudable as such a motive might have been, it cannot be denied that the end result was arbitrary.

The problem we have with what the ALJ did lies in the fact that, no matter how hard we try to find logic in his action, the more frustrated we become, and the more we become convinced his action was arbitrary. Could he not have ordered a 14-day suspension, leaving to the Department the ultimate question whether appellant was an appropriate candidate for a §23095 petition? Could he not simply have adopted the Department recommendation? Had he addressed the issue, and yet ordered the "standard" penalty, it would have been difficult for anyone to say he acted out of blind adherence merely because he accepted the Department's recommendation.

The Department asserts that appellant's argument rests on the faulty premise

that §23095 is a matter before the ALJ, that it is the Department which considers a §23095 petition, and it is a matter of discretion. We agree that whether a licensee may pay a fine in lieu of serving a 15-day or shorter suspension is a matter within the discretion of the Department, reasonably exercised. It would seem, however, that such a determination should be made only after a petition to that effect has been filed and the Department has conducted the investigation required by §23095. By his arbitrary assessment of a 16-day penalty, the ALJ deprived appellant of the opportunity to petition for payment of a fine in lieu of suspension.

This Board has said on various occasions that it views the Department's penalty recommendation at the close of a hearing as representing the Department's best thinking at that particular time, and where an ALJ departs upwardly from the recommendation, he or she should explain why. In this case, the Department's recommendation came long after appellants had raised, and then, by inaction, abandoned the underground regulation defense to any prospective penalty. The ALJ's "explanation" for his upwards departure simply reinforces our view that his action was an unreasonable response to an issue which he thought confronted him.[4]

II

Appellants contend that "if the Administrative Law Judge concluded that the decoy complied with Rule 141(b)(2) based upon the decoy's appearance at the Administrative Hearing, and if that appearance ... was noticeably different than the

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[4] We do not find any substantial evidence that the ALJ acted vindictively. We have noted instances in the transcript of the hearing where the ALJ acknowledged his frustration with appellants' counsel, but we do not see that frustration as having risen to the level appellants would have us believe, nor, based upon what we have read, do we think it at all unwarranted.

appearance displayed at the decoy operation itself, then the Administrative Law Judge reached an incorrect and unsupported conclusion."

The problem we have with a contention put forth as appellants have in this case is that the whole issue is left to speculation. Appellants have pointed only to the fact that the decoy may have giggled during her testimony but not at the time of the sale. They refer to her weight and height, but do not suggest either changed between the date of the sale and the date of the hearing.

We have reviewed the ALJ's findings, and are satisfied that he carefully weighed the decoy's appearance as it was at the hearing and as it would have been at the time of the sale.

We find no merit to this contention.

ORDER

The decision of the Department is affirmed except as to penalty, and the case is remanded to the Department for reconsideration of the penalty in light of our comments herein.[5]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[5] 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.