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

AB-8235
File: 20-379680 Reg: 03055452

7-ELEVEN, INC., and CONVENIENCE GROUP, INC.,
dba 7-Eleven Store # 2174-19200
101 West Katella Avenue, Anaheim, CA 92802,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: December 2, 2004
Los Angeles, CA
ISSUED FEBRUARY 7, 2005

7-Eleven, Inc., and Convenience Group, Inc., doing business as 7-Eleven Store # 2174-19200 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which ordered two 15-day suspensions of their license, to be served concurrently, for their clerk selling alcoholic beverages to two non-decoy minors, violations of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Convenience Group, Inc., appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

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[1]The decision of the Department, dated January 8, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' present off-sale beer and wine license was issued on October 19, 2001, but prior to that, from October 1989 until October 2001, the same type of license was held at the same location by appellant 7-Eleven, Inc., and James Greene, who is a principal in appellant Convenience Group, Inc. The Department filed an accusation charging that, on May 17, 2003, appellants' clerk sold alcoholic beverages to 17-year-old Stephanie Cadena and 18-year-old Ghiath Dakar.

An administrative hearing was held on November 7, 2003, at which time documentary evidence was received, and testimony concerning the sale was presented. Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no defense had been established. Appellants appealed, contending that the penalty imposed was based on an underground regulation, or, if the penalty was not based on an underground regulation, the Department failed to follow its penalty guidelines.

DISCUSSION

I

Appellants contend that the 15-day suspension cannot stand because it is based on an "underground regulation" in violation of the Administrative Procedure Act. (Gov. Code, § 11340 et seq. (APA).)

Government Code section 11340.5, subdivision (a), states: "No state agency shall 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 defines regulation as "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." Section 11425.50, subdivision (e), provides that "a penalty may not be based upon a guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule subject to Chapter 3.5 (commencing with section 11340) unless it has been adopted as a regulation pursuant to Chapter 3.5 (commencing with section 11340)."

In *Vicary* (2003) AB-7606, the Board determined that the penalty guidelines found in the Department's Instructions, Interpretations and Procedures Manual were "underground regulations," i.e., regulations that have not been adopted as such under the provisions of the APA. Appellant alleges that these same penalty guidelines were the basis for the penalty imposed in the present case.

The order in the proposed decision, which the Department adopted, imposes a 15-day suspension for each of the two counts in the accusation and provides that the two 15-day suspensions are to be served concurrently. Appellants appear to argue as follows: The guidelines specify a 15-day suspension for a sale to a minor; Department counsel recommended a 15-day suspension; the proposed decision orders 15-day suspensions; and the Department adopted the proposed decision, including penalty; therefore, the suspension must be based on the guidelines.

There is no evidence in this record that would support a determination that the penalty proposed by the ALJ and adopted by the Department was pursuant to any

guidelines. The Department made no reference to any guidelines in its decision, nor did Department counsel when making the penalty recommendation on behalf of the Department. Hence, it would be unwarranted for the Board to assume that the penalty order was based upon guidelines, and appellants have offered nothing to support their argument that any guidelines were followed.

We cannot assume, simply because penalty guidelines exist, that they controlled the penalty imposed by the Department. The mere fact that Department counsel recommended, and the Department adopted, a 15-day suspension is not, by itself, proof that it was based upon an underground regulation. Appellant's approach, carried to its logical conclusion, would require the ALJ to deviate from the Department recommendation in imposing a penalty, whether or not he thought it reasonable and appropriate. We find this logic unpersuasive.

Although appellants included an objection to the penalty to be recommended as one of a number of defenses in a Special Notice of Defense filed prior to the hearing, no reference was made to this defense in the course of the hearing, no evidence was offered in support of it, and no argument was presented respecting it during closing argument. It cannot be said that this contention was raised in a manner that reasonably put the ALJ on notice that appellants intended to preserve the objection. In fact, the ALJ considered this objection waived along with all but one of the defenses asserted in the Notice of Defense and Special Notice of Defense. He noted, in the fifth introductory paragraph of the proposed decision that "The parties did not litigate the other issues tendered in the notices [of defense]. In the absence of any showing to the contrary, no meritorious ground of objection to the Accusation, the procedure used or the proceeding itself is found to exist and the Special Notice of Defense is overruled."

Without some evidence that suggests the ALJ felt bound by the Department's recommendation and/or its guidelines, we cannot say with sufficient certainty to justify reversal that the penalty was based on such guidelines. Surely, knowing that its guidelines have been said to be underground regulations, the Department is not precluded from imposing a certain penalty simply because it is the same as the penalty stated in the guidelines criticized in *Vicary*.

II

Appellants contend, in the alternative, that if the Board finds the penalty was not based on an underground regulation, the ALJ erred because he did not follow the Department's request for a 15-day license suspension. They point out that the Department counsel recommended a 15-day suspension during closing argument, but the ALJ ordered two 15-day suspensions, to run concurrently. They assert that this is an aggravated penalty without a basis to support either the aggravation or the imposition of a penalty different from that recommended by the Department, since, although two minors were present, only one purchase took place. Appellants conclude by asserting that, "because the Department certified the ALJ's Proposed Decision which contains a penalty different than that in the Department's penalty guidelines, the Department did not follow its penalty guidelines, and the decision should be reversed."

Appellants' reasoning here is faulty. In the first place, the two concurrent 15-day suspensions do not constitute an aggravated penalty, since the actual suspension is only 15 days. We note that the record contains a copy of a letter, dated January 8, 2004, the same date the Department issued its decision, which offers appellants the opportunity to pay a fine in lieu of serving the suspension, since the license has been ordered suspended "for a period of 15 days."

Secondly, the ALJ did not order a penalty different from that recommended by the Department. After both parties had presented their initial closing arguments, the ALJ questioned Jonathon Logan, counsel for the Department (RT 63):

> THE COURT: Mr. Logan, let me ask you if this accusation were only one count I presume you'd still be asking for 15 days?
>
> MR. LOGAN: Correct, Your Honor. It would be concurrent, Counts 1 and 2.

In other words, the Department was actually recommending two concurrently served 15-day suspensions, which is what the ALJ also found to be appropriate, and which the Department adopted as its penalty order.

Since the ALJ did not propose, and the Department did not adopt, a penalty that was aggravated or different from that recommended by the Department at the hearing, appellants' contention is baseless. Thus, it is unnecessary to consider appellants' contention that the decision should be reversed because the Department did not follow the penalty guidelines in imposing the penalty in this case.

ORDER

The decision of the Department is affirmed.[2]

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[2]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.