

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

AB-8782

File: 21-425690 Reg: 07065354

SHARMEENS ENTERPRISES, INC., dba Short Stop 22
9501 Van Nuys Blvd., 116, 117, & 118, Panorama City, CA 91402,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: September 2, 2010
Los Angeles, CA

ISSUED OCTOBER 25, 2010

Sharmeens Enterprises, Inc., doing business as Short Stop 22 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days 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 Sharmeens Enterprises, Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer Casey.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on April 5, 2006. Thereafter, the Department filed an accusation against appellant charging that, on

¹The decision of the Department, dated November 27, 2007, is set forth in the appendix.

October 26, 2006, appellant's clerk, Ravi Ahuja (the clerk), sold an alcoholic beverage to 19-year-old Mariana Olvera. Although not noted in the accusation, Olvera was working as a minor decoy for the Los Angeles Police Department at the time.

At the administrative hearing held on September 25, 2007, documentary evidence was received, and testimony concerning the sale was presented by Olvera (the decoy) and by Detective Deseray Ehrlich, a Los Angeles police officer.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no defense had been established.

Appellant has filed a timely appeal in which it contends that it was prevented from presenting evidence that the penalty was a product of an underground regulation.

DISCUSSION

Appellant challenges the penalty imposed in this matter on the ground it was the product of an unlawful underground regulation. The question presented to us in the present appeal is whether it was error for the administrative law judge (ALJ) to preclude testimony that appellant contends would provide it with some kind of defense. We believe it was not error.

Appellant predicates its "underground regulation defense" on Government Code section 11340.5 which 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].)

Appellant's offer of proof, however, 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 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 an alleged underground regulation, nor does it establish that the Department utilized, enforced, or attempted to enforce the alleged underground regulation in this case.

We conclude that the proffered testimony of the District Administrator would do nothing to show that the alleged underground regulation existed or that the Department issued, used, enforced, or attempted to enforce the alleged underground regulation in this case. The proposed testimony was irrelevant.

ORDER

The decision of the Department is affirmed.²

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

² 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.