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

AB-8864
File: 20-345038 Reg: 07066128

7-ELEVEN, INC., and DEBBIE L. TRIPLETT, dba 7-Eleven 2133-27433
1945 South Broadway, Santa Maria, CA 93454,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: August 5, 2010
Los Angeles, CA

ISSUED SEPTEMBER 15, 2010

7-Eleven, Inc., and Debbie L. Triplett, doing business as 7-Eleven 2133-27433 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk, Nicholas McCloud, having sold a six-pack of Coors Light beer to Amanda Tracy, a 16-year-old Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Debbie L. Triplett, appearing through their counsel, Ralph B. Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Valoree Wortham.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on August 10, 1998. A

[1]The decision of the Department, dated March 17, 2008, is set forth in the appendix.

Department accusation was filed against appellants on June 19, 2007, charging the sale on May 12, 2007, of an alcoholic beverage to Amanda Tracy, a person under 21 years of age. Although not stated in the accusation, Tracy was acting as a minor decoy for the Department.

An administrative hearing was held on January 9, 2008, at which time documentary evidence was received and testimony concerning the violation charged was presented by Department investigator Nick Sartuche and Amanda Tracy, the minor decoy. 7-Eleven franchisee Debbie Triplett testified concerning store policies and employee training.

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

Appellants filed a timely notice of appeal in which they contend that the administrative law judge (ALJ) improperly quashed a subpoena, thereby preventing appellants from presenting evidence that the Department utilized an underground regulation in its assignment of penalties. Appellants do not contest the finding that there was a violation of section 25658, subdivision (a), nor do they challenge the penalty as excessive.

DISCUSSION

Appellants seek in this appeal to show that the Department District Administrators utilize an underground regulation, i.e., a regulation not adopted pursuant to the requirements of Government Code section 11340.5, subdivision (a)[2] in its

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[2] Government Code section 11340.5, subdivision (a) provides:

> No state agency shall issue, utilize, enforce or attempt to enforce any

(continued...)

penalty determination. The thrust of appellants' argument is that the Department's District Administrators uniformly follow a policy that determines what they shall recommend as a penalty in a first-strike sale-to- minor case, using as a guideline the period of time the licensee has been free of discipline.

The offer of proof in support of appellants' subpoena seeking to compel the testimony of District Administrator Christopher Albrecht set out what his expected testimony would be:

> My position duties include(d) reviewing licensee files and making an official penalty recommendation consistent with the Department's policies, if an accusation is filed against a licensee.
>
> Prior to making my official penalty recommendation in this case: I was aware of the facts giving rise to this accusation; I was aware that Amanda Tracey the minor decoy in this case was 16 years old; I reviewed the Department's file for the licensee; I reviewed the police reports; I reviewed the color photograph of the minor decoy; I reviewed the ABC-338 Form; My understanding was that the licensee had been licensed at this location under the current license since 1998 and the previous license since 1990. The licensee was disciplined in 2001 and has no other final discipline since that time.
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> I am aware of Rule 144.
>
> I am also aware that the Department has a policy regarding the length of discipline-free licensure and the recommended penalty that are [*sic*] not contained in the Penalty Guidelines adopted pursuant to Rule 144. (hereinafter

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[2](...continued)
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.

Government Code section 11342.600 states:

> "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.

"Policy")

> The Department's Policy dictates that locations that have been licensed and have not violated California Business and Professions Code Section 25658 for less than five years will receive a recommended penalty of a 15-day suspension. The Department's policy also dictates that locations that have been licensed and have not violated Section 25658 for at least five years but less than eight years will receive a recommended penalty of a 10-day suspension. The Department's policy further dictates that locations that have been licensed and have not violated Section 25658 for [at] least eight years will receive a recommended penalty of a 10-day suspension with all 10 days stayed for one year.
>
> The Department's Policy has not been adopted pursuant to the Department's rule-making authority, or promulgated in compliance with the requirements of the Administrative Procedures [*sic*] Act.
>
> I have had conversations with other District Administrators concerning the aforementioned Policy. Other District Administrators are familiar with and adhere to the Policy in making penalty recommendations.
>
> I determined that there were no factors of aggravation in this case.

(App. Br., p. 10.)

What this offer of proof importantly does not claim is that a District Administrator's penalty recommendation is the actual penalty assessed after the matter has gone to hearing, witnesses have testified, documentary evidence has been introduced, and opposing counsel have argued what an appropriate penalty, if any, should be. At best, it is an offer to settle a case in advance of an administrative hearing, and the tentative basis for Department counsel's penalty recommendation *after* the hearing has concluded. In neither case is any recommendation assured of being adopted by an administrative law judge, for at that stage Department Rule 144 (4 Cal. Code Regs., §144) comes into play.

Rule 144, a duly promulgated regulation, directs that, in reaching a decision, the Department "shall consider the disciplinary guidelines entitled 'Penalty Guidelines' (dated 12/17/2003) which are hereby incorporated by reference. Deviation from these

guidelines is appropriate where the Department in its sole discretion determines that the facts of the particular case warrant such a deviation -- such as where facts in aggravation or mitigation exist." The Penalty Guidelines Appendix declares: "It is the policy of this Department to impose administrative, non-punitive penalties in a consistent and uniform manner with the goal of encouraging and reinforcing voluntary compliance with the law." The Appendix further states, in a paragraph entitled "Penalty Policy Guidelines":

> The California Constitution authorizes the Department, in its discretion to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.
>
> Higher or lower penalties from this schedule may be recommended based on the facts of individual cases where generally supported by aggravating or mitigating circumstances.

The Penalty guidelines go on to list sample aggravating or mitigating factors, and the penalties, ranging from short suspensions to orders of revocation, assigned to specific violations.

The Department cites and relies on the Board's recent decision in *Jasper Kaur and Parmit Randhawa* (2010) AB-8973 ("*Randhawa*"), a decision appellants summarily dismiss as "myopic", which rejected claims identical to those made in this case. We are unpersuaded by appellant's criticism of *Randhawa*, which controls this case.

Appellants' strategy, as reflected in this and the many other cases which have

reached the Appeals Board, appears to be an attempt to impose restrictions on the Department's penalty-setting discretion above and beyond those contained in the Rule 144 Penalty Guidelines.

When a District Administrator makes a penalty recommendation, he or she does so in a unilateral fashion, and presents it to a licensee at a 309 meeting, an event somewhat akin to a settlement conference, prior to any hearing or the exchange of discovery. Should a licensee choose to litigate rather than settle, that recommendation survives only to the point where Department counsel makes his or her recommendation at the close of the hearing. But, in between the time the District Administrator's recommendation is made and the close of the administrative hearing, much will have taken place that may or may not have been anticipated by the District Administrator. Licensee counsel will have had the opportunity to conduct his or her own investigation, and may be alerted to factors of aggravation or mitigation which, with skillful examination of witnesses, could dilute or magnify their impact on the trier of fact, i.e., the administrative law judge, who determines what the penalty will in fact be.[3]

ALJ Lewis explained why he did not believe the offer of proof in this case was relevant:

> The Court:... I did review Exhibits A and B, the offer of proof and the brief, prior to going on the record today.
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> They appear to be the same in nature as ones that have previously been filed by your office, and I did review them and I will ask you, as I have done in the past, to your knowledge , have you or anyone from your office met with Mr. Albrecht to discuss this particular case at or about the time that it was filed in -- from the time it was filed in approximately June 19, 2007 up until today?

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[3] While the Department has the power to reject a proposed decision, it did not do so in this case nor does it do so in most cases.

Mr. Akopyan: I personally have not and I'm not aware of any facts about anybody else from my office.

The Court: It will do me absolutely no value to have Mr. Albrecht appear here and testify as to what he may or may not have been thinking back in May and June of 2007 as far as a penalty recommendation is concerned.

If, in fact, the Accusation is sustained, the recommended penalty will be mine. It will be based upon Rule 144 and it will be based upon any mitigating and/or aggravating evidence that is presented here today.

So Mr. Albrecht's testimony here would be a complete waste of everyone's time, as far as I am concerned, so the motion to quash is granted.

[RT 8-9.]

We are satisfied that the penalty in this case was a product of Rule 144 and the judgment of an administrative law judge, untainted by an underground regulation.

ORDER

The decision of the Department is affirmed.[4]

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

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[4] 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.