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

AB-8953
File: 20-442274 Reg: 08068272

7-ELEVEN, INC., and DAMANJIT SAHOTA,
dba 7-Eleven Store 2121 21453D
5650 Baltimore Drive, La Mesa, CA 91942,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: December 2, 2010
Los Angeles

ISSUED JANUARY 27, 2011

7-Eleven, Inc., and Damanjit Sahota, doing business as 7-Eleven Store 2121 21453D (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 Damanjit Sahota, appearing through their counsel, Ralph Barat Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on November 7, 2006. On

[1]The decision of the Department, dated September 19, 2008, is set forth in the appendix.

March 25, 2008, the Department filed an accusation against appellants charging that, on June 23, 2007, appellants' clerk, Bradley Thomas (the clerk), sold an alcoholic beverage to 18-year-old Desirae Vargas. Although not noted in the accusation, Vargas was working as a minor decoy for the La Mesa Police Department at the time.

At the administrative hearing held on July 31, 2008, documentary evidence was received and testimony concerning the sale was presented by Vargas (the decoy) and by Jeff Raybould, a La Mesa Police officer. Damanjit Sahota, one of the licensees, also testified.

Prior to the administrative hearing, appellants served a subpoena on Department District Administrator Jennifer Hill, maintaining that her testimony regarding pre-hearing penalty recommendations would establish the existence of an illegal underground regulation.

While the administrative law judge (ALJ) did not technically quash the subpoena, he effectively quashed it by not allowing the testimony of the District Administrator. He found that her testimony, concerning pre-hearing settlement offers and negotiations, was irrelevant and inadmissable. [RT 8.]

The Department's decision determined that the violation charged was proved and no defense to the charge was established.

Appellants then filed a timely appeal contending that the ALJ erred in preventing them from presenting evidence that the penalty was a product of an underground regulation.

DISCUSSION

The question presented in this matter is whether it was error for the ALJ to preclude testimony that appellants contend would provide them with some kind of

defense.

Appellants predicate their "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].)

Appellants' 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 do not believe the testimony of the District Administrator would 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. We agree that the proposed testimony was irrelevant.

ORDER

The decision of the Department is affirmed.[2]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, 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.