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

AB-8988
File: 20-435267 Reg: 08068014

7-ELEVEN, INC., and RAQBA INC., dba 7-Eleven Store 2173-13734C
3737 West 230th Street, Torrance, CA 90505,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: May 6, 2010
Los Angeles, CA

ISSUED AUGUST 5, 2010

7-Eleven, Inc., and Raqba, Inc., doing business as 7-Eleven Store 2173-13734C (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their off-sale beer and wine license for 12 days for their clerk, Baljinder Sidhu,[2] having sold a 24-ounce can of Budweiser beer to Sean Van Lingen, a 19-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Raqba, Inc., appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

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[1]The decision of the Department, dated December 11, 2008, is set forth in the appendix.

[2] Sidhu testified that he is the franchisee, and is also president of Raqba, Inc.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on February 16, 2006. In 2008, the Department instituted an accusation against appellants charging that Baljinder Sidhu sold an alcoholic beverage to a person under the age of 21 on October 31, 2007.

An administrative hearing was held on October 23, 2008, at which time documentary evidence was received and testimony concerning the violation charged was presented by Sean Van Lingen, the decoy, and Patrick Hunt, a Torrance police detective. Baljinder Sidhu testified concerning efforts taken by appellants to comply with the law.

Subsequent to the hearing, the Department issued its decision which determined that the violation had been proved, no affirmative defense had been established, and that appellants' compliance efforts warranted a mitigated penalty.

Appellants filed a timely notice of appeal in which they contend that the Department utilized an underground regulation in connection with its penalty determination.

DISCUSSION

At the hearing, appellants requested a continuance because the Department's District Administrator, although subpoenaed by appellants, had not appeared to testify. Appellants provided a written offer of proof regarding the District Administrator's testimony and a brief arguing why the testimony was necessary.

Appellants contend that the administrative law judge (ALJ) erroneously refused to enforce the subpoena they served on District Administrator Marcie Griffin, precluding her testimony regarding the Department's use of prohibited underground regulations in

determining disciplinary penalties. This was error, appellants argue, because the ALJ's stated reasons for doing so "entertained no definitive criteria," and he "determined that listening to [the witness] would have been a waste of his time." (App.Br. at 2.)

The ALJ did not say it would be a waste of time. He said, instead [RT 9-10]:

> The Court: We've gone over this issue many times now, and it's our position that any penalty recommendation made by the District Administrator prior to the hearing is not relevant in this Matter.
>
> One, the Administrative Law Judge is not privy to said penalty recommendation that is made prior to the hearing.
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> Secondly, as Ms. Winters has pointed out, prehearing settlement offers are not admissible. So I'm not going to require the District Administrator to appear here before us to testify regarding a penalty recommendation for a settlement offer that was made prior to today's hearing.
>
> What we are interested in and what is relevant is a penalty recommendation made by the Department's attorney at the conclusion of the hearing. And although that recommendation is not binding, that is one of the factors that we take into consideration in determining the appropriate penalties in this Matter should the Department prove its case.
>
> So I'm not going to continue the Matter, and I'm not going to do any of the other things that the respondent's [*sic*] atorney was requesting.

The offer of proof contained what appellants said would be the substance of the District Administrator's testimony. It represented that the District Administrator would testify that the Department has a policy in which the length of discipline-free licensure affects the penalty recommended and that this policy has not been adopted in compliance with the Administrative Procedure Act (Gov. Code, §§ 11340-11529). Specifically, the District Administrator would testify that, according to the policy, 5 to 8 years of discipline-free operation would result in a penalty of 10 days' suspension for a sale-to-minor violation, rather than the standard 15 days, and at least 8 years of discipline-free operation would result in a penalty of 10 days' suspension with all 10

days stayed for one year.

The Department moved to quash the subpoena on the ground that the District Administrator's testimony about the penalty recommendation would not be relevant to the ALJ's consideration of the appropriate penalty to propose. The ALJ agreed and effectively quashed the subpoena by refusing to enforce it, his reasoning set out above.

The question presented in this appeal, however, is not whether the District Administrator's testimony would be helpful to the ALJ in making his penalty recommendation, but whether it was error to preclude testimony showing, according to appellants, that the Department based its penalty recommendation on an illegal underground regulation.[3] We conclude it was not error.

Government Code section 11340.5 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

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[3]Unless there is a clear abuse of discretion, the ALJ's reasons for quashing the subpoena are really of no consequence; the Appeals Board reviews Department decisions for their results, not their reasons. (See, e.g., *Coastside Fishing Club v. California Resources Agency* (2008) 158 Cal.App.4th 1183, 1191 [71 Cal.Rptr.3d 87]; *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 980–981 [35 Cal.Rptr.2d 669, 884 P.2d 126]; *Davey v. Southern Pacific Co*. (1897) 116 Cal. 325, 329-330 [48 P. 117].) Appellant has not shown an abuse of discretion, so the Board must decide whether or not the subpoena was properly quashed, for whatever reason.

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].)

The offer of proof 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 that 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 the alleged underground regulation. Nor does the offer of proof establish that the Department utilized, enforced, or attempted to enforce the alleged underground regulation in this

case.

The alleged underground regulation, according to the offer of proof, would dictate a penalty of 10 days' suspension, all stayed conditioned on the successful completion of a 1-year probationary period. At the hearing, the Department recommended a penalty of 15 days' suspension, the standard penalty established in rule 144. The Department suspended the license for 12 days. Neither the Department's penalty recommendation at the hearing nor the penalty actually imposed provide any support for the existence of the alleged underground regulation.

We conclude that the proffered testimony of the District Administrator would not show that an underground regulation existed or that the Department issued, used, enforced, or attempted to enforce the alleged underground regulation in this case. The testimony was properly excluded.

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 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.