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

AB-8996
File: 20-377555 Reg: 08068854

CHEVRON STATIONS, INC., dba Chevron
1900 North Rose Avenue, Oxnard, CA 93036,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

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

ISSUED AUGUST 9, 2010

Chevron Stations, Inc., doing business as Chevron (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for its clerk, Rosa Martinez, having sold a 24-ounce can of Bud Light beer, an alcoholic beverage, to James Johnson, a 16-year-old Department minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Chevron Stations, Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on October 23, 2001. On May 29, 2008, the Department instituted an accusation against appellant charging that its

[1]The decision of the Department, dated January 15, 2009, is set forth in the appendix.

clerk, Rosa Martinez, sold a 24-ounce can of Bud Light beer to James Johnson, a 16-year-old Department minor decoy, on February 23, 2008.

An administrative hearing was held on November 5, 2008, at which time documentary evidence was received and testimony concerning the violation charged was presented. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established and rejected appellant's claim that the decoy lacked the appearance required by Rule 141(b)(2). Administrative Law Judge McCarthy found that the decoy, who was 16 years and one month of age on the day of the transaction, was asked for and produced his true California identification. It bore a red stripe with prominent white letters stating "21 in 2013" and a blue stripe with letters stating "AGE 18 IN 2010." The clerk examined the ID, said something to the effect that the decoy looked so young, consulted with another clerk whether she should make the sale, and then completed the sale. What the other clerk said was not established. (Finding of Fact 7.)

Appellant filed a timely notice of appeal in which it contends that the Department utilized an underground regulation in its penalty assessment.

DISCUSSION

Appellant contends the ALJ erroneously quashed the subpoena appellant served on District Administrator Judy Matty, preventing her testimony regarding the Department's use of prohibited underground regulations in determining disciplinary penalties. Quashing the subpoena was error, appellant argues, because the ALJ's stated reasons for doing so were "wholly without merit and meaning," the District Administrator's testimony is relevant to the issue of underground regulations, and the Department's "protocol" within the lawfully promulgated rule 144 (4 Cal. Code Regs., §

144) is an underground regulation.

At the hearing, appellant's counsel represented to the ALJ that the argument in support of the District Administrator's testimony was the same as counsel had made in many cases previously. Appellant's counsel said no more on the subject at the hearing, but provided a written offer of proof and a brief regarding Matty's hypothetical testimony. The ALJ quashed the subpoena saying, "I find the testimony not to be helpful."[2] [RT 8.]

In a number of prior appeals, appellant's counsel has attempted to have a District Administrator testify regarding penalty determinations. As far as this Board can tell, the recent appeal of *Garfield Beach* (2009) AB-8725, is representative of such appeals. In *Garfield Beach*, the appellant requested a continuance because the District Administrator, who was served with a subpoena, was not present at the hearing. The appellant made an offer of proof that the District Administrator "could provide explanation and insight into the Department's suggested penalty in this matter, as well as speak to any salient facts which might justify any deviation from the suggested penalty set forth in the Department's Penalty Guidelines (4 Cal. Code Regs., §144)."

The ALJ denied the request in *Garfield Beach* on the ground that the testimony offered would not be relevant. This Board agreed, saying:

> It appears to be the case that the District Administrator advises the attorney charged with litigating the case of the penalty the attorney is to recommend to an ALJ. Of course, an ALJ is not bound by the Department's recommendation made at the hearing, and may depart from the Penalty Schedule in Rule 144 if the evidence warrants such.
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> We do not see how the District Administrator's view, prior to any hearing, as to what would be an appropriate penalty has any meaningful

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[2] We can find no statement by the ALJ that comes close to appellant's assertion that the ALJ stated it would be a waste of his time to listen to Ms. Matty's testimony. (App. Br. at p. 2.)

> bearing on what penalty an ALJ chooses to recommend after a hearing. The ALJ hears evidence developed in an adversary setting, where a licensee has the opportunity to argue why the evidence supports a departure from the penalty urged by Department counsel, or where the Department may argue for an aggravated penalty under the same penalty guidelines. The ALJ is not bound by the Department's suggestion, and, we know from the many cases we have heard, an ALJ often imposes a penalty more lenient than the Department has urged. ¶ . . . [W]e see little or no relevance in an ALJ knowing what the District Administrator might seek in the way of a suspension to settle a charge before the filing of an accusation. An ALJ relies on an objective assessment of the evidence after listening to testimony and the partisan appeals of counsel, and ultimately is guided by that assessment and the Penalty Schedule of Rule 144, including its criteria for aggravated or mitigated penalties.
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> Injecting the pre-hearing views of a District Administrator would, in our opinion, only serve to add delay.

Contrary to appellant's representation to the ALJ at the administrative hearing, this appeal presents an altogether different argument than that made in prior cases like *Garfield Beach*, *supra*. In those cases, the appellants argued that the testimony would provide information to the ALJ about how and why the District Administrator arrived at the Department's penalty recommendation. Appellant here argues that the testimony would show the District Administrator's penalty recommendation was based on an invalid underground regulation which, it asserts, would require dismissal of the accusation or mitigation of the penalty.

The question presented to us in the present appeal is not whether the District Administrator's testimony would be helpful to the ALJ in making his penalty recommendation, but whether it was error for the ALJ to preclude testimony that appellant contends would provide it with some kind of defense.[3] We believe it was not

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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].)

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.

Appellant has not shown an abuse of discretion, so the Board must decide whether or not the subpoena was properly quashed, for whatever reason.

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 the 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 testimony was properly excluded by quashing the subpoena.[4]

[4] We note that the remedy, if an underground regulation had been shown to exist, would almost certainly not be dismissal of the accusation or mitigation of the penalty (see *In re Ronje* (2009) 179 Cal.App.4th 509, 519 [101 Cal.Rptr.3d 689]), but remand to the Department to allow it to properly adopt the protocol as a regulation, or, more likely, to impose the penalty without use of the underground regulation, which, of course, is what the Department has done here.

ORDER

The decision of the Department is affirmed.[5]

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

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[5]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.