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

AB-8971
File: 20-320545 Reg: 08068686

7-ELEVEN, INC., ROBERT S. ELKINS, and JOANNE D. ELKINS,
dba 7-Eleven #2131-17637
1522 Graves Avenue, El Cajon, CA 92021,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

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

ISSUED SEPTEMBER 21, 2010

7-Eleven, Inc., Robert S. Elkins, and Joanne D. Elkins, doing business as 7-Eleven #2131-17637 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days for the sale of an alcoholic beverage to a person under the age of twenty-one, a violation of Business and Professions Code section 24200, subdivisions (a) and (b), and 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Robert S. Elkins, and

[1],The decision of the Department, dated November 13, 2008, is set forth in the appendix.

Joanne D. Elkins, appearing through their counsel, Ralph B. Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Valerie Wortham.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 8, 1996. On May 15, 2008, the Department filed an accusation against appellants charging that appellants' employee sold an alcoholic beverage to 18-year-old Darlene Williams on February 9, 2008. Although not noted in the accusation, Williams was working as a minor decoy for the San Diego County Sheriff's Department at the time.

At the administrative hearing held on September 11, 2008, documentary evidence was received and testimony concerning the violation charged was presented by the decoy, Darlene Williams; two deputies from the Sheriff's Department, Jason Philpot and John West; and appellant Robert Elkins.

Subsequent to the hearing, the Department issued its decision which determined that appellants' license should be suspended for ten days.

Appellants filed a timely appeal contending that quashing the subpoena of a District Administrator prevented appellants from proving the existence of an underground regulation utilized by the Department in connection with its penalty assessment.

DISCUSSION

Appellants contend that it was error to quash the subpoena of a District Administrator, because this prevented appellants from proving the existence of an underground regulation utilized by the Department in its penalty determination.

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 appellants contend would provide them with some kind of defense.[2] We believe it was not error.

In *People v. Superior Court (Long*) (1976) 56 Cal.App.3d 374, 378 [126 Cal.Rptr. 465] the court stated:

> "[T]he court may quash a subpoena that is regular on its face where *the facts justify such action*." (*People v. Rhone* (1968) 267 Cal.App.2d 652, 657 [73 Cal.Rptr. 463]; italics added.) A subpoena may properly be quashed where the witness would not have contributed material evidence. (See, e.g., *In re Finn* (1960) 54 Cal.2d 807, 813 [8 Cal.Rptr. 741, 356 P.2d 685]; *People v. Singletary* (1969) 276 Cal.App.2d 601, 604 [81 Cal.Rptr. 79]; *People v. Rhone*, supra, at pp. 656-657.)

The Department moved to quash the subpoena of the District Administrator because "her testimony would be irrelevant and is also inadmissable. It is really just prehearing settlement information that she would be providing . . ." [RT 8]. The ALJ agreed with the Department and quashed the subpoena because as he noted, administrative law judges are not privy to prehearing settlement offers and he was interested in the recommendation of the Department as to penalty - not in recommendations made prior to the hearing as part of a settlement negotiation [RT 9]. In other words, he felt the facts supported a quashing of the subpoena.

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[2]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., *Davey v. Southern Pacific Co*. (1897) 116 Cal. 325, 329-330 [48 P. 117]*; 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].) Appellants have not shown an abuse of discretion, so the Board must decide whether or not the subpoena was properly quashed, for whatever reason.

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. While the offer of proof indicates this District Administrator knows of other District Administrators who know of and use this policy, it does not indicate whether she speaks of two other District Administrators or ten. 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. This offer of proof, even if it accurately reflects 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 that the testimony of the District Administrator would have established that the alleged underground regulation existed, or that it was improper for the ALJ to quash the subpoena of the District Administrator.

ORDER

The decision of the Department is affirmed.[3]

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

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[3]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.