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

AB-8224
File: 20-361020 Reg: 03054370

7-ELEVEN, INC., and M&N ENTERPRISES, INC., dba 7-Eleven Store # 2121-13642
2920 Adrian Street, San Diego, CA 92110,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria
Appeals Board Hearing: September 2, 2004
Los Angeles, CA

ISSUED DECEMBER 29, 2004

7-Eleven, Inc., and M&N Enterprises, Inc., doing business as 7-Eleven Store # 2121-13642 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 25 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 M&N Enterprises, Inc., appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

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[1]The decision of the Department pursuant to Government Code section 11517, subdivision (c), dated December 24, 2003, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on December 29, 1999. On January 14, 2003, the Department filed an accusation against appellants charging that, on October 10, 2002, appellants' clerk, Deborah Paiva (the clerk), sold an alcoholic beverage to 19-year-old Hanna Greenwood. Although not noted in the accusation, Greenwood was working as a minor decoy for the San Diego Police Department at the time.

At the administrative hearing held on May 13, 2003, documentary evidence was received, and testimony concerning the sale was presented by Greenwood (the decoy) and by Larry Darwent, a San Diego police officer.

Subsequent to the hearing, the administrative law judge (ALJ) prepared a proposed decision for the director's consideration that found the violation was established and imposed a 15-day suspension.[2] On July 31, 2003, the Department issued a notice stating that it would not adopt the proposed decision, but would decide the matter itself pursuant to Government Code section 11517, subdivision (c) (section 11517(c)). On November 6, 2003, the Department notified appellants that, pursuant to section 11517(c)(2)(E), it would consider additional evidence in its review of the proposed decision, namely, the Department's decision with regard to a prior sale-to-minor violation by appellants (reg. no. 010052131), which was affirmed by the Appeals Board in *7-Eleven, Inc., and M&N Enterprises, Inc.* (AB-7983), issued on April 16, 2003. The Appeals Board's decision was not final until three days after the hearing in the present matter, on May 16, 2003.

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[2]The ALJ's proposed decision, dated June 3, 2003, is included in the appendix.

On December 2, 2003, appellants submitted to the Department a written argument and a request for discovery requesting all documents regarding "any standard and/or criteria upon which the Department bases its recommended penalty under § 11517(c)." The Department advised appellants it would not comply with their request, and appellants filed a motion to compel discovery, dated December 11, 2003. The Department again refused to comply with the request.

On December 24, 2003, the Department issued its decision pursuant to section 11517(c), adopting the ALJ's finding of a violation, and imposing a 25-day suspension in place of the 15-day suspension proposed by the ALJ.

Appellants filed a timely appeal contending that the Department's imposition of a 25-day suspension instead of the 15-day suspension proposed by the ALJ was pursuant to an illegal underground regulation, and the Department wrongly refused to comply with appellants' discovery request.

DISCUSSION

I

Appellants contend that the 25-day suspension cannot stand because it is based on an "underground regulation" in violation of the Administrative Procedure Act. (Gov. Code, § 11340 et seq. (APA).)

Government Code section 11340.5, subdivision (a), states: "No state agency shall 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 and filed with the Secretary of State pursuant to this chapter." Section

11342.600 defines regulation as “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.” Section 11425.50, subdivision (e), provides that “a penalty may not be based upon a guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule subject to Chapter 3.5 (commencing with section 11340) unless it has been adopted as a regulation pursuant to Chapter 3.5 (commencing with section 11340)."

In *Vicary* (2003) AB-7606, the Board determined that the penalty guidelines found in the Department’s Instructions, Interpretations and Procedures Manual (the Manual) at pages L225 through L229 were "underground regulations," i.e., regulations that have not been adopted as such under the provisions of the APA. Appellant alleges that these same penalty guidelines were the basis for the penalty imposed in the present case.

There is no evidence in the record that would support a determination that the penalty imposed was pursuant to any guidelines. On the contrary, the Department carefully described the circumstances that caused it to impose a 25-day suspension in the part of the decision labeled "Penalty Considerations":

> In response to the Department's Order dated November 6, 2003 (see footnote 1), Respondents submitted various arguments with respect to the prior discipline suffered (the additional evidence considered by the Department) and the issue of penalty in this case. Respondents make two arguments: (1) the Department is not required to impose a 25-day suspension (as was recommended during the hearing held on May 13, 2003); and (2) the recommended penalty is based upon an underground regulation (citing *Vicary v. ABC*, AB-7606a (Nov. 2003)). Each of these arguments shall be addressed below:

(1) While Business and Professions Code Section 25658.1 does state, as noted by Respondents, that no licensee may petition the Department to make an offer in compromise in lieu of suspension for a second violation of Section 25658 within any 36 month period, it does not in any way limit the discretion of the Department to adopt an appropriate penalty based upon the facts of the case. Indeed, the Legislature recognized the broad authority and discretion of the Department to fashion appropriate discipline for sales of alcohol to minors when it stated in subdivision (b) of Section 25658.1 that the "three strikes" provision "shall not be construed to limit the department's authority and discretion to revoke a license prior to a third violation when the circumstances warrant that penalty."

The facts and circumstances of this case certainly warrant the discipline adopted herein. As indicated above, the license was issued in December 1999. Less than two years later, on October 12, 2001, Respondents violated Section 25658 when alcohol was sold to a minor. Now, almost one year after that violation, on October 10, 2002, Respondents have again violated Section 25658 with the sale of alcohol to a minor. On both occasions, the selling clerk requested and received valid identification showing the minors involved to be under the age of 21 - this notwithstanding the testimony of Nancy Shearon, president of Respondent M&N Enterprises, in both cases, that 7-Eleven's Come of Age Training had been given to the responsible clerks, which included looking for the red stripe on identifications. The suspension adopted in this case is not intended to punish Respondents, rather it is intended to impress upon Respondents the importance of preventing sales of alcoholic beverages to minors, and of taking the necessary steps to insure such sales do not continue to occur in their licensed business.

(2)The Appeals Board did find in the *Vicary* case (supra) that the Department's penalty policy had not been adopted as a regulation pursuant to the Administrative Procedures Act, and thus could not be the basis upon which a penalty may be imposed. However, Respondents in this case, prior to their arguments submitted in connection with the Department's review of this case pursuant to Government Code Section 11517(c), made no such argument with respect to the penalty recommended by the Department during the May 13, 2003 hearing. Nor have Respondents submitted a single shred of evidence that the Department's penalty recommendation at that time or now is based upon an underground regulation.

Notwithstanding that the record is bare of any grounds to make such an argument, the penalty that follows is considered independent of the penalty policy declared to be invalid by the Appeals Board and is based upon the facts of the case.

The Department made no reference to any guidelines in its decision, nor did Department counsel when making the penalty recommendation on behalf of the Department. Hence, it would be unwarranted for the Board to assume that the penalty order was based upon guidelines, and appellants have offered nothing to support their argument that any guidelines were followed.

We cannot assume, simply because penalty guidelines exist, that they controlled the penalty imposed by the Department, particularly where, as here, the Department carefully articulated its reasons for deciding what penalty it thought appropriate to achieve the desired level of discipline.

II

After the Department rejected the ALJ's proposed decision and issued its notice that it would consider additional evidence in deciding the case itself, appellants filed a request for discovery under Government Code section 11507.6. When the Department did not comply with the discovery request, appellants filed a Motion to Compel Discovery as provided in section Government Code section 11507.7. They contend that they are entitled to discover "all written records pertaining to any standard and/or criteria upon which the Department based the 25 day suspension." Appellants argue that, without the written documentation they have requested, the Appeals Board cannot evaluate the merits of the Department's statement in its decision that the 25-day suspension was considered "independent of the penalty policy declared to be invalid by the Appeals Board and is based upon the facts of this case."

Our review of Government Code section 11507.6 convinces us that appellant is not entitled to discovery when the Department decides a case itself under section 11517(c). Section 11507.5 provides that "The provisions of Section 11507.6 provide

the exclusive right to and method of discovery as to any proceeding governed by this chapter." Section 11507.6 describes the situation and timing of discovery requests under the APA:

> After *initiation of a proceeding in which a respondent or other party is entitled to a hearing on the merits*, a party, upon written request made to another party, *prior to the hearing* and *within 30 days after service by the agency of the initial pleading or within 15 days after the service of an additional pleading*, is entitled to (1) obtain the names and addresses of *witnesses* to the extent known to the other party, including, but not limited to, those *intended to be called to testify at the hearing*, and (2) inspect and make a copy of any of the following in the possession or custody or under the control of the other party . . . . [Italics added.]

This language, particularly that we have italicized, clearly contemplates discovery as a *pre-hearing* procedure. Appellant is not "entitled to a hearing on the merits" when the Department makes its decision pursuant to section 11517(c); the Department is only required to "[afford] the parties the opportunity to present either oral or written argument before the agency itself." (Gov. Code, §11517, subd. (c)(2)(E)(ii).) Section 11517(c) does not include a provision for discovery.

III

When appearing before this Board, counsel for appellants stated, without contradiction, that he and Department counsel wished to submit the matter for decision without oral argument because they agreed this case involves ex parte communication controlled by this Board's recent decision in *KV Mart* (2004) AB-8121.

In *KV Mart*,[3] the appellant filed a Motion to Augment Record, contending that the record should include a report prepared by the Department's advocate after the

[3]The Board also issued decisions in two other cases involving the same issues: *Kim* (8/24/04) AB-2148 and *Quintanar* (8/19/04) AB-8099. The Department filed petitions for writ of review with the Second Appellate District Court in all three of these cases, where they remain pending at the time of our order in this matter.

administrative hearing that was made available to the Department's decision maker and the advisor to the decision maker. The Appeals Board reversed the decision of the Department, concluding that the Department was required to include this report in the record pursuant to Government Code section 11430.50 because it was an ex parte communication prohibited by Government Code section 11430.10.

Business and Professions Code section 23087 requires the Board (or a reviewing court) to remand the matter to the Department "[w]henever . . . the parties . . . agree upon a settlement or adjustment . . . upon the stipulation by the parties that such an agreement has been reached." This Board is not privy to the agreement between the parties or the rationale used in concluding that *KV Mart* controls the decision in the present appeal. However, that is of no consequence; the fact that they agreed is all that is required to take the matter out of the Board's hands and return it to the Department's jurisdiction.

ORDER

The decision of the Department is reversed, and the matter is remanded to the Department for such further proceedings as are necessary and appropriate.[4]

TED HUNT, CHAIRMAN
KAREN GETMAN, 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.