ISSUED JUNE 8, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

ANHEUSER-BUSCH, INC. 1400 Marlborough Ave. Riverside, CA 92507, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)))))))))))	AB-6826 File: 09/17-52096 Reg: 96035894 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: March 4, 1998 San Francisco, CA

Anheuser-Busch, Inc. (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 10 days for appellant's employee giving a gift or free goods (an alcoholic beverage) to a nonlicensee, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25600.

Appearances on appeal include appellant Anheuser-Busch, Inc., appearing through its counsel, James M. Seff, Emmett C. Stanton, and J. Daniel Davis; and

[1]The decision of the Department pursuant to Government Code §11517, subdivision (c), dated February 25, 1997, and the Proposed Decision of the Administrative Law Judge, dated September 6, 1996, are set forth in the appendix.

the Department of Alcoholic Beverage Control, appearing through its counsel, David Wainstein and John Peirce.

FACTS AND PROCEDURAL HISTORY

Appellant's beer and wine importer and beer and wine wholesaler licenses were issued on October 30, 1979. Thereafter, the Department instituted an accusation against appellant charging that appellant's employee, Dan Partelow, gave free goods (a bottle of Red Wolf beer, an Anheuser-Busch product) to a nonlicensee customer (who happened to be a Department investigator) of a licensed on-sale premises in connection with the sale or distribution of alcoholic beverages.

An administrative hearing was held on August 1, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the giving of the beer to the nonlicensee and the industry practice of "trade spending."

Subsequent to the hearing, the Administrative Law Judge (ALJ) issued his Proposed Decision. The Department, on October 24, 1996, notified appellant that it did not adopt the Proposed Decision and, on February 25, 1997, issued its decision under Government Code 11517, subdivision (c), which determined that appellant's employee had made a gift of a beer to a nonlicensee in connection with the sale or distribution of an alcoholic beverage.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: 1) the purchase of a single bottle of beer for a consumer was an instance of the industry practice of "trade spending" authorized

under Business and Professions Code §23386 and Rule 52(b) (4 Cal.Code Regs., §52, subd. (b)), and, as such, did not violate Business and Professions Code §25600; 2) the finding that the gift of the beer was made in connection with a sale of an alcoholic beverage was not supported by substantial evidence in light of the whole record; and 3) even if the Department's determinations were correct, there was no showing of "good cause" such that discipline could be imposed.

DISCUSSION

I

Appellant contends that the purchase of a single bottle of beer for a consumer was an instance of the industry practice of "trade spending" authorized under Business and Professions Code §23386 and Rule 52(b), and, as such, did not violate Business and Professions Code §25600.

On May 2, 1995, Department investigator Michael Lodge was present at Roxbury East, a licensed on-sale premises. He was approached by a young man, later identified as Dan Partelow, appellant's director of marketing, and was given a Bud Ice beer in exchange for the Budweiser beer that he (Lodge) had been drinking. Other patrons of the premises were also given Anheuser-Busch beers in exchange for the beers of other brewers that they had been drinking.

The beers were given to the customers by employees of appellant pursuant to a promotion called "sampling" or "trade spending." In this promotion, a manufacturer's representative goes to a retail establishment, buys his or her employer's brands of beers at retail, and offers these beers free to customers of the

establishment who are drinking competitors' brands. Appellant's witnesses at the administrative hearing testified that "trade spending" is a long-standing and widespread brewing-industry practice.

Business and Professions Code §25600 provides, in pertinent part:

> "(a)(1) No licensee shall, directly or indirectly, give any premium, gift, or free goods in connection with the sale or distribution of any alcoholic beverage, except as provided by rules which shall be adopted by the department to implement this section or as authorized by this division.
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> * * *
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> (b) No rule of the department may permit a licensee to give any premium, gift, or free goods of greater than inconsequential value in connection with the sale or distribution of beer. With respect to beer, premiums, gifts, or free goods, including advertising specialties that have no significant utilitarian value other than advertising, shall be deemed to have greater than inconsequential value if they cost more than twenty-five cents ($0.25) per unit, or cost more than fifteen dollars ($15) in the aggregate for all those items given by a single supplier to a single retail premises per calendar year."

Business and Professions Code §23386 provides, in its entirety:

> "Any manufacturer's, wine grower's, manufacturer's agent's, rectifier's, importer's, or wholesaler's license also authorizes the giving away of samples of the alcoholic beverages which are authorized to be sold by the license under such rules as shall be prescribed by the department. A retail license does not authorize the furnishing or giving away of any free samples of alcoholic beverages."

Rule 52(b) states:

> "Licensees or officers, agents or employees of licensees may make gifts of alcoholic beverages to nonlicensees provided such gifts are not made in connection with the sale of an alcoholic beverage."

Appellant contends that the Department, in interpreting §25600 as prohibiting "trade spending," is impermissibly changing §23386 and Rule 52(b), since both permit "trade spending." Any change to the statute, appellant points

out, must be made by the legislature, and any regulatory change must follow the rulemaking procedures of the Administrative Procedure Act (APA).

Section 25600 clearly prohibits giving gifts or free goods in connection with the sale or distribution of an alcoholic beverage, but it goes on to say "except as provided by rules [of] the department . . . or as authorized by this division." Section 23386, part of the same division as §25600, authorizes certain (non-retail) licensees, including appellant, to give away samples of the beverages they produce, clearly constituting a statutory exception to §25600. The only restrictions on such give-aways are those set by Department rules. The Department rule promulgated under §23386 is Rule 52, which provides guidelines for samples (subdivision (a)) and expressly allows gifts of alcoholic beverages to nonlicensees (subdivision (b)). [2]

The plain language of the statutes and rule lead us to conclude that §23386 and Rule 52(b) are exceptions to §25600 that authorize "trade spending" in the form of gifts of alcoholic beverages to nonlicensees, provided the gifts are not made in connection with the sale of an alcoholic beverage.

However, the Department argues that giving free beer to consumers violates §25600 because it is given "in connection with the sale or distribution" (emphasis added) of beer as that term is used in §25600. The Department relies on the case

[2]Appellant provides some interesting information in connection with the history of Rule 52(b) which the Department fails entirely to address. The information provided does tend to show that trade spending was considered as covered by Rule 52(b), and it would have been helpful to have the Department comment on the regulatory amendment process.

of Miller Brewing Co. v. Department of Alcoholic Beverage Control (1988) 204 Cal.App.3d 5 [250 Cal.Rptr. 845] which involved §25600 and its relationship to Department Rule 106 (4 Cal.Code Regs., §106). The court there held that because of the circumstances attending the 1983 amendment of §25600, the term "distribution," which was added to the section in that amendment, must be defined as

> "'the process by which commodities get to final consumers, including storing, selling, shipping and advertising' or 'the marketing or merchandising of commodities' with 'merchandising' being defined as 'sales promotion as a comprehensive function including market research, development of new products, coordination of manufacture and marketing, and effective advertising and selling'."

(Miller Brewing Co., supra, at 15.)

The Department, after quoting this language, asserts that Miller Brewing "stands four-square for the proposition that the engaged upon conduct is prohibited by [§25600]. (Dept. Br. at 3rd [unnumbered] page.)

Miller Brewing, however, dealt with Rule 106, not Rule 52(b), and the language being considered, while the same in both cases with regard to §25600, is different in the two rules. Rule 106(a), dealing with advertising and merchandising of alcoholic beverages, prohibits free goods "in connection with the sale or distribution of alcoholic beverages [emphasis added]." Subdivision (b)(8) defines 'sales' for purposes of Rule 106 to mean:

> "the total business of merchandising alcoholic beverages, including the solicitation of customers and the various methods and procedures used in advertising and promoting the sale of alcoholic beverages, as well as the actual transfer of title of alcoholic beverages."

Rule 52(b), on the other hand, deals specifically with restrictions on giving and allows gifts to be made to nonlicensees "provided such gifts are not made in connection with the sale of an alcoholic beverage." Rule 52(b) does not restrict giving in connection with the distribution, but only in connection with the sale of an alcoholic beverage. Therefore, the language of the court in Miller Brewing regarding the definition of "distribution" is not applicable to the analysis of a case under Rule 52(b). In fact, the Miller Brewing court found that the activities of the brewer (distributing free concert tickets and jackets to radio stations for distribution to consumers) could not be prohibited by the Department under the "sale" provision of §25600. The court explained that "sale" for purposes of §25600 uses the general definition found in §23025 and means only the transfer of title to alcoholic beverages for consideration. (Miller Brewing, supra, at 11-12.) Since Rule 52 does not include a specialized definition of "sale," it uses the same §23025 "transfer of title" definition as does §25600.

The Department's reliance on Miller Brewing is misplaced. Considering the case as a whole, we find that it does not stand for the proposition that appellant's conduct is prohibited by §25600.

The Department also argues that §25600, subdivision (b),[3] restricts the cost of free goods to twenty-five cents (25¢) and that the cost of the beer given by appellant clearly exceeded that limit. Since the Department may not enforce a

[3]See page 5, supra, for the text of subdivision (b).

regulation that is inconsistent or in conflict with the statute, the Department argues that even if Rule 52(b) authorizes trade spending, it cannot authorize a gift of beer costing more than 25¢. This argument is rejected. The restriction of subdivision (b) is applicable to free goods given to retailers, not gifts or samples given to nonlicensees. This is made clear in the part of subdivision (b) that the Department does not quote, which we underline here: "twenty-five cents ($0.25) per unit, or cost more than fifteen dollars ($15) in the aggregate for all those items given by a single supplier to a single retail premises per calendar year."

The Department also contends that there is "the clear understanding and common application of the Department that this section [Rule 52(b)] authorizes Christmas, birthday or other holiday gifts and not trade spending . . . ." However, the Department's understanding and application of the rule is an interpretation that is not evident from the language of the rule. A "standard of general application" must generally be promulgated in a regulation under the rulemaking provisions of the Administrative Procedure Act ("APA"; Gov. Code §11340 et seq. [Gov. Code Chaps. 3.5, 4, 4.5, and 5]) in order to be enforceable (Gov. Code §11340.5, subd. (a)) or to be the basis for any penalty (Gov. Code §11425.50, subd. (e)). We are not compelled to address this contention further, however, since the Department does not make any argument in support of it.

II

To be permissible under Rule 52(a), the gift of an alcoholic beverage must not be made "in connection with the sale of an alcoholic beverage." The

Department argues that the gift of beer was in connection with the sale of alcoholic beverages "since appellant bought the beer and Roxbury sold the beer immediately preceding the 'gift'." (Dept. Br. at 5th [unnumbered] page.) Appellant argues that the gift of beer was not made "in connection with the sale of an alcoholic beverage." The purpose of the prohibition against gifts made in connection with sales, states appellant, "is to assure that the recipient is not compelled or required to purchase the gift-giving licensee's alcoholic beverage products" (App. Br. at 12), and there was no requirement that the donee purchase appellant's beer in order to receive the gift beer at Roxbury's on the night in question.

We agree with appellant. The mere fact that the gift beer had been sold to the donor does not automatically mean that the gift was given "in connection with" the sale. A "connection" between two events means that there is some kind of relationship between them such as "cause and effect, logical sequence, mutual dependence or involvement."[4] This definition is complementary to the purpose of the prohibition against gifts "in connection with" sales. To find that a gift is in connection with a sale simply because the gift item is sold and purchased before it is given as a gift does not in any way address the purpose, or comply with the definition, of the language of Rule 52(b). The evil to be avoided concerns sales to a nonlicensee donee, not those to a licensed donor, and this does not appear to be a

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[4]Webster's Third New International Dictionary (1986) page 481. See also Adler v. Federal Republic of Nigeria, 107 F.3d 720, 726 (9th Cir. 1997) [discussing requirement for "commercial activity" exception to Foreign Sovereign Immunities Act--"To satisfy the 'in connection with' requirement, the acts complained of must have some 'substantive connection' or a 'causal link' to the commercial activity."]

risk with trade spending. The gift of beer by appellant's employee was not "in connection with" the sale of that beer to appellant's employee by Roxbury.[5]

III

Appellant contends that even if the Department was correct in determining that the gift of beer violated §25600, there is no evidence that such gift was contrary to public welfare and morals, and therefore, there was no constitutionally required "good cause" for imposing discipline.

CONCLUSION

The decision of the Department is reversed.[6]

RAY T. BLAIR, JR., CHAIRMAN
JOHN B. TSU, MEMBER
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[5]Appellant also points out that the logical consequence of the Department's interpretation would be that only manufacturers could make gifts to nonlicensees under Rule 52(b), even though the rule applies to licensees without restriction as to the type of license held. Appellant argues that the Department's interpretation would also limit §§ 24045.2, 24045.3, 24045.4, 24045.6, and 24045.9, which allow licensees to donate beer or wine to public television stations, women's educational and charitable organizations, and tax-exempt nonprofit corporations that hold special temporary licences, "provided such donations are not made in connection with a sale of an alcoholic beverage."

[6]This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.