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

AB-8181
File: 20-214389 Reg: 02052209

7-ELEVEN, INC., GURDIP CHEEMA, and BALDEV CHEEMA,
dba 7-Eleven # 2173-26916
1212-A West Anaheim Street, Harbor City, CA 90710,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: June 10, 2004
Los Angeles, CA

ISSUED JULY 29, 2004

7-Eleven, Inc., Gurdip Cheema, and Baldev Cheema, doing business as 7-Eleven # 2173-26916 (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., Gurdip Cheema, and Baldev Cheema, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and R. Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

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[1]The decision of the Department, dated July 31, 2003, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on November 27, 1988. Thereafter, the Department instituted an accusation against appellants charging that, on November 7, 2001, appellants' clerk, Tarsem Lal (the clerk), sold an alcoholic beverage to 18-year-old Josaphat Orozco. Although not noted in the accusation, Orozco was working as a minor decoy for the Los Angeles Police Department at the time.

An administrative hearing was held on February 5, May 9, and July 16, 2003, at which time documentary evidence was received, and testimony concerning the sale was presented by Orozco (the decoy) and by Dennis Kato, a Los Angeles police officer.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no defense had been established.

Appellants filed an appeal making the following contentions: (1) The penalty imposed was improperly based on an "underground regulation," and (2) the administrative law judge (ALJ) violated the standard set in *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506 [113 Cal.Rptr. 836], by failing to resolve a conflict in the testimony.

DISCUSSION

I

Appellants contend that the penalty imposed by the Department was 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.

The Department argues there is no evidence in the record supporting appellants' contention that an underground regulation was the basis for the penalty order in this case. It points out that the guidelines were not introduced as evidence in this record, and that the penalty recommendation made by the Department's counsel is not evidence. In addition, the Department argues that the penalty imposed by the administrative law judge (ALJ) cannot be considered to be based on the penalty

guidelines because the recommendation made at the conclusion of the hearing was non-binding, and the ALJ was free to modify the recommended penalty in any way he deemed appropriate.

Appellant's brief notes that the Board appended to its decision in *Vicary* a copy of the "General Guidelines" for penalties included in the Manual.[2] Although a copy of the penalty guidelines did not accompany appellant's brief, and there are no copies in the record, the Board may take official notice of the copy appended to the *Vicary* decision.

In *Sacher* (2004) AB-8124, essentially the same arguments were made as the parties make here. The Board said "it would be unwarranted" for it to "assume, simply because penalty guidelines exist, that they controlled the penalty imposed by the ALJ." In that case, however, neither the ALJ nor Department counsel referred to the guidelines at the hearing, and the ALJ "carefully articulated his reasons for deciding what penalty he thought appropriate to achieve the desired level of discipline."

In the present case, Department counsel stated that the 25-day suspension he recommended was the Department's "standard penalty on the second-time offense, which this is . . . ." (RT (7/16/03) 6.) The decision's Determination of Issues simply states that the sale to the decoy "constitutes cause for suspension of Respondent's license" and orders the license suspended for 25 days.

We agree that counsel's statements in closing argument are not direct evidence of use of the penalty guidelines in the present case. However, the guidelines include instructions for their use which, in conjunction with the statements made at the hearing,

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[2]The most recent update of these pages, as indicated by a date at the bottom of each page, is October 16, 1997.

lead us to infer that the penalty here was based on the guidelines. On page L225 of the Manual, it states:

> The penalties indicated in this section of the Guide Book are intended as general guides and are those penalties which the Department usually imposes for the offenses indicated. Higher or lower penalties may be warranted depending on the aggravating or mitigating factors present in the particular case.
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> It is the District Administrator or District Supervisor's responsibility to objectively assess each alleged violation on its own factual merits, considering the Department's standard penalty and the presence of any factors of aggravation or mitigation. Penalty recommendations in different cases should be consistent when the same factors are present. *Deviation from the standard penalties requires the presence of either aggravation or mitigation and must be so indicated on the ABC-309.* It is also imperative that the concept of progressive discipline be kept in mind when recommending penalties. Failure to do so may result in reduced penalties at hearings.
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> *It is the Assistant Director's (field) and Deputy Division Chief's responsibility to ensure that penalties recommended by District are in line with the standard penalties and that deviations from the standard are fully justified and explained on the ABC-309.* In addition, Division review should also ensure that the Districts are consistent in their approach to penalties. [Italics added.]

This language, and especially that we have italicized, makes it clear that the standard penalties of the guidelines are to be used as the penalties recommended at hearings unless "deviations from the standard are fully justified and explained on the ABC-309," a form apparently used internally by the Department. At the hearing, the Department explained the basis for its recommendation to the ALJ as simply the "standard penalty" and the ALJ imposed that standard penalty in the proposed order with no explanation of why the recommended penalty was imposed. Under the circumstances, it appears warranted to infer that the penalty imposed was based on the Department's guidelines.

The Law Revision Commission's comments to subdivision (e) of Government Code section 11425.50 provide, in part:

> If a penalty is based upon an 'underground rule' - one not adopted as a regulation as required by the rulemaking provisions of the Administrative Procedure Act - a reviewing court should exercise discretion in deciding the appropriate remedy. Generally the court should remand to the agency to set a new penalty without reliance on the underground rule but without setting aside the balance of the decision.

Because the penalty was based on an "underground regulation," the penalty must be reversed and remanded for reconsideration without reference to the Department's penalty guidelines.

II

Appellants challenge the part of Finding of Fact IV that says: "The decoy, while face-to-face with Lal, then identified Lal as the seller. This identification was in compliance with the Department's Rule 141(b)(5)." Appellants contend that to reach that conclusion, the ALJ must have accepted the officer's account of the identification, and the finding is "insufficient as a matter of law" because the ALJ did not explain why he accepted the officer's testimony over the decoy's "irreconcilably different account." (App. Br. at 11.) Appellants argue that this did not "bridge the analytic gap between the raw evidence and the ultimate decision or order" as required by the California Supreme Court's holding in *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836] (*Topanga*).

Appellants misapprehend *Topanga*. It does not hold that findings must be explained, only that findings must be made. This is made clear when one reads the entire sentence that includes the phrase on which appellants rely: "We further conclude that implicit in section 1094.5 is a requirement that the agency which renders the challenged decision *must set forth findings* to bridge the analytic gap between the raw evidence and ultimate decision or order." (*Topanga*, *supra*, 11 Cal.3d 506, 515, italics added.)

In *No Slo Transit, Inc. v. City of Long Beach* (1987) 197 Cal.App.3d 241, 258-259 [242 Cal.Rptr. 760], the court quoted with approval, and added italics to, the comment regarding *Topanga* made in *Jacobson v. County of Los Angeles* (1977) 69 Cal.App.3d 374, 389 [137 Cal.Rptr. 909]: " 'The holding in Topanga was, thus, that *in the total absence of findings in any form on the issues supporting the existence of conditions justifying a variance*, the granting of such variance could not be sustained.' " In the present appeal, there was no "total absence of findings" that would invoke the holding in *Topanga*.

Appellants' demand that the ALJ "explain how [the conflict in testimony] was resolved" (App. Br. at p. 2) is little more than a demand for the reasoning process of the ALJ. The California Supreme Court made clear in *Fairfield v. Superior Court of Solano County* (1975) 14 Cal.3d 768, 778-779 [122 Cal.Rptr. 543], that, as long as findings are made, a party is not entitled to attempt to delve into the reasoning process of the administrative adjudicator:

> As we stated in *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836, 522 P.2d 12]: "implicit in [Code of Civil Procedure] section 1094.5 is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order."[Fn.]
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> In short, in a quasi-judicial proceeding in California, the administrative board should state findings. If it does, the rule of *United States v. Morgan* [(1941)] 313 U.S. 409, 422 [85 L.Ed. 1429, 1435 [61 S.Ct. 999]] precludes inquiry outside the administrative record to determine what evidence was considered, and reasoning employed, by the administrators.

In any case, appellants' argument is fundamentally flawed because it relies on the erroneous conclusion that the face-to-face identification would not have complied with the rule if the officer asked the decoy "Is this the person who sold to you?" rather than asking "Who sold you the beer?". The Board has rejected this type of argument in a number of

cases, and the same rationale applies here. (*7-Eleven, Inc./Vameghi* (2004) AB-8065; *The Vons Companies, Inc*. (2004) AB-8058.)

ORDER

The decision of the Department is affirmed, but the penalty is reversed and remanded to the Department for reconsideration without reliance on the penalty guidelines.[3]

TED HUNT, CHAIRMAN
KAREN GETMAN, 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.