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

AB-8194
File: 47-375454 Reg: 02052586

HOF'S HUT RESTAURANTS, INC. dba Lucilles Smokehouse BarBque
21420 Hawthorne Boulevard, Torrance, CA 90503,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: November 4, 2004
Los Angeles, CA

ISSUED JANUARY 7, 2005

Hof's Hut Restaurants, Inc., doing business as Lucilles Smokehouse BarBque (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for its employee, Holly Wells (Wells), having sold alcoholic beverages (beer) to police decoys 17-year-old Danny Ramirez (Ramirez) and 18-year-old Wendy Villanueva (Villanueva), in violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Hof's Hut Restaurants, Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on October 3,

[1]The decision of the Department, dated September 18, 2003, is set forth in the appendix.

2001. On March 25, 2002, the Department instituted an accusation against appellant charging the unlawful sale of alcoholic beverages to two minors.

An administrative hearing was held on August 6 and September 20, 2002, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Brian O'Steen, a Torrance police officer, and by Ramirez and Villanueva, the two decoys. Maria Tapia, appellant's assistant manager, testified on behalf of appellant, describing the training given to appellant's employees.

Subsequent to the hearing, the Department issued its decision which determined that the violations had occurred as alleged in the accusation, and no affirmative defense had been established.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant contends that there was no compliance with Rule 141(b)(5).[2]

DISCUSSION

Two decoys were involved in the decoy operation in question. Both were asked whether they had been asked by one of the police officers to identify the person who had sold them the alcoholic beverages. Both said they had. Ramirez gave a straight-forward account of the identification process which took place after he and Villanueva were escorted from the premises:

Q. And what happened when you were outside?

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[2] Rule 141(b)(5) provides:

> Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer accompanying the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased the alcoholic beverage make a face to face identification of the alleged seller of the alcoholic beverages.

A. We just waited until the waitress came outside.

Q. Okay. And once the waitress was outside, what happened?

A. We had to identify her and take a picture with her.

Q. Okay. Did somebody ask you – what did the officer ask you?

A. Who sold us the alcohol.

Q. And how did you respond to that?

A. Pointed to the waitress and said "She sold it to me."

Q. Okay. And where were you when that happened?

A. Outside.

Q. Okay. And was the waitress outside also?

A. Yes.

Q. How far were you standing from the waitress when you identified her as the seller?

A. Couple of feet.

Q. And was – what was the waitress doing when you identified her?

A. Nothing. She was kind of laughing.

Q. Was she looking at you?

A. Yes.

Q. And was a photograph taken of you with the waitress?

A. Yes.

The photograph (Exhibit 4) shows Ramirez and Villanueva each pointing at the waitress who is standing between them.

Villanueva initially testified that she was outside the premises when she identified the waitress (Wells) as the seller. According to Villanueva, Wells was still inside the

premises, “doing her job ... behind the counter.” Then, after questioning from the ALJ, and considerable prompting from Department counsel, Villanueva revised her testimony and said she identified Wells as the seller from a distance of five feet, after Wells had been brought outside.

The ALJ made a factual finding (Finding of Fact VII) that there was a face to face identification in compliance with the rule:

> After paying for the beverages, Villanueva exited the restaurant with Ramirez. A police officer brought Wells outside to have Villanueva and Ramirez identify her. Ramirez and Villanueva each identified Wells as the person who served them the beverages. Ramirez and Villanueva were “a couple of feet” from Wells and face-to-face with her during the identification. The identification was in compliance with the Department’s Rule 141(b)(5).

Appellant contends that Villanueva’s testimony is irreconcilably in conflict with that of Ramirez, such that the ALJ was obligated to explain how he resolved that conflict. Appellant cites the decision of the California Supreme Court in *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836], and argues that the ALJ failed to make findings which bridge the gap between the raw evidence and the ultimate decision.

Appellant misapprehends *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*.

Appellant's demand that the ALJ explain how the conflict in testimony was resolved 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.

We have carefully reviewed the testimony of both decoys, and it is our sense that, once the confusion seen in Villanueva's testimony was cleared up, the so-called conflict in the testimony of the two is greatly exaggerated.

ORDER

The decision of the Department is affirmed.[3]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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

Any party may, before this final decision becomes effective, apply to the appropriate district 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.