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

AB-9224
File: 20-442436 Reg: 11074884

KHANDOKER TAHAMINA SULTANA, dba Azteca Market
3370 Verdugo Road, Los Angeles, CA 90065,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: November 1, 2012
Los Angeles, CA

ISSUED DECEMBER 5, 2012

Khandoker Tahamina Sultana, doing business as Azteca Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his license for 25 days for his 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 appellant Khandoker Tahamina Sultana, appearing through his counsel, Ralph Barat Saltsman and D. Andrew Quigley, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kimberly J. Belvedere.

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[1]The decision of the Department, dated December 15, 2011, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on July 18, 2006. On April 7, 2011, the Department filed an accusation charging that appellant's clerk, Tareq Bin Maksud (the clerk), sold an alcoholic beverage to 19-year-old Diego Blanco on December 12, 2010. Although not noted in the accusation, Blanco was working as a minor decoy for the Los Angeles Police Department (LAPD) at the time.

At the administrative hearing held on September 27, 2011, documentary evidence was received, and testimony concerning the sale was presented by Blanco (the decoy); by LAPD officers Raquel Trujillo and Luis Reyes; and by Syed Rahman, the manager of the licensed premises.

Testimony established that the decoy went to the licensed premises on December 12, 2010, with two LAPD officers, who entered the premises first to make sure it was safe. One of the officers exited the premises prior to the entrance of the decoy, who then proceeded to the coolers and selected a 24-ounce can of Mickey's Malt Liquor, which he took to the register. The clerk scanned the item and asked for identification. The decoy handed the clerk his California driver's license, which he observed for a few seconds before completing the sale. A face-to-face identification of the seller was made, and since the clerk did not have identification he was taken to the station to be booked. Later, the clerk was fired.

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

Appellant filed an appeal contending: (1) rule 141(b)(2)[2] was violated, (2) the

[2]References to rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

ALJ abused his discretion in imposing the penalty, and (3) the Department failed to prove that the beverage purchased by the decoy was an alcoholic beverage.

DISCUSSION

I

Appellant contends that there was insufficient evidence to support a finding that the decoy possessed the appearance which could generally be expected of a person under the age of 21, as required by rule 141(b)(2).[3]

The ALJ made the following findings about the decoy's appearance in Finding of Fact 13 and Conclusion of Law 8:

> FF 13. Blanco appeared his age at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of Maksud at the Licensed Premises on December 12, 2010, Blanco displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Maksud.
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> CL 8. The Respondent argued that the decoy operation at the licensed Premises failed to comply with rule 141(b)(2) [fn. omitted] and therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the respondent argued that Blanco did not have the appearance generally expected of a person under the age of 21 based on his prior experience as a decoy and his training as an Explorer. This argument is rejected. As set forth above, Blanco had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 13.)

Appellant contends that substantial evidence does not exist to support the conclusion that the decoy's appearance complied with rule 141(b)(2), and that the ALJ failed to explain how the decoy's conduct contributed to his youthful appearance.

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[3]Rule 141(b)(2) dictates: "The decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense."

Therefore, appellant asserts, the decision violates the requirement of *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506 [113 Cal.Rptr. 836] (*Topanga*) that the Department must "bridge the gap between the raw evidence presented . . . and the ultimate conclusion." (App.Br. at p. 3.)

The ALJ observed the decoy in person, and this Board has long held that this provides substantial evidence to support the determination of the decoy's apparent age. (*7-Eleven, Inc./Nagra & Sunner* (2004) AB-8064.)

The contention that the Department failed to comply with *Topanga* has been rejected by this Board numerous times. For example, in *7-Eleven, Inc./Cheema* (2004) AB-8181, the Board said: "Appellants misapprehend *Topanga*. It does not hold that findings must be explained, only that findings must be made." (Accord, *No Slo Transit, Inc. v. City of Long Beach* (1987) 197 Cal.App.3d 241, 258-259 [242 Cal.Rptr. 760]; *Jacobson v. County of Los Angeles* (1977) 69 Cal.App.3d 374, 389 [137 Cal.Rptr. 909].)

Appellant is really demanding the Department's reasoning. As this Board has explained many times, the Department is not required to explain its reasoning.

> 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:
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> > 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.

(*United El Segundo, Inc*. (2007) AB-8517.)

Appellant has not shown that substantial evidence was lacking nor that it is entitled to additional analysis.

II

Appellant contends that the ALJ abused his discretion by failing to make factual findings to support his recommended penalty, and by failing to consider evidence of mitigation.

In the Penalty section of the proposed decision, the ALJ made a finding that "[T]he penalty recommended herein complies with rule 144." Appellant maintains that it was an abuse of discretion not to make specific findings on how the recommended penalty complied with the rule. As we explained, *supra*, findings need not be explained by the ALJ.

Rule 144 provides for a 25-day suspension when a licensee sells alcohol to a minor for a second time in a 36-month period, and for revocation when there is a third such incident in a 36-month period. (Cal. Code Regs., tit. 4, §144.) The licensee in this matter was given a 15-day suspension for a sale-to-minor violation in January of 2010. Appellant conceded at the administrative hearing that the penalty for a "normal second strike case" was a 25-day suspension, seeming to acknowledge that the instant matter is the second such incident.[4]

[4]There is another sale-to-minor matter pending against this licensee, registration number 11074885, which is the subject of appeal number AB-9225.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1965) 62 Cal. 2d 589, 594 [43 Cal.Rptr. 633].)

Unless some statute requires it, an administrative agency's decision need not include findings with regard to mitigation. (*Vienna v. California Horse Racing Bd*. (1982) 133 Cal.App.3d 387, 400 [184 Cal.Rptr. 64]; *Otash v. Bureau of Private Investigators* (1964) 230 Cal.App.2d 568, 574-575 [41 Cal.Rptr. 263].) Appellant has not pointed out a statute with such requirements. Findings regarding the penalty imposed are not necessary as long as specific findings are made that support the decision to impose disciplinary action. (*Williamson v. Board of Medical Quality Assurance* (1990) 217 Cal.App.3d 1343, 1346-1347 [266 Cal.Rptr. 520].)

Appellant does not dispute that the Department's findings support the decision that a previous sale-to-minor violation occurred in January 2010, and that the incident on December 12, 2010 would constitute the second such sale within 36 months. In addition, the ALJ made a finding that the recommended penalty complied with rule 144. Therefore, no abuse of discretion resulted from the lack of findings regarding mitigation.

Appellant appears to be operating under the mistaken notion that the Department is required to reduce a penalty if some evidence exists that can somehow be labeled "mitigating." This is not correct. The Department's discretion, while not unfettered, is very broad, and this Board is not entitled to disturb the exercise of that discretion unless there is palpable abuse. It is appellant's responsibility to demonstrate such abuse, and nothing in the contentions presented here reaches that level.

III

Appellant contends finally that the Department failed to lay the proper foundation to prove that the beverage purchased by the decoy was an alcoholic beverage. The can of Mickey's Malt Liquor was returned to the licensed premises immediately after the sale, so it was not produced at the hearing. Appellant maintains that the Department incorrectly "presumes" the beverage purchased was alcoholic.

Finding of Fact 10 states:

> FF 10. Since the can of Mickey's Malt Liquor was returned to the Licensed Premises immediately after the sale, it was not produced at the hearing. Blanco is holding the can in the photo of him with Maksud, but it is too dark to read the label. [Exhibit 5.] Ofcr. Trujillo testified that, based on her experience, Mickey's Malt Liquor contains 5.6% alcohol by volume. Blanco testified that his older brother drinks Mickey's Malt Liquor, sometimes getting drunk off it. He believed that it contained 5.9% alcohol by volume.

The ALJ also notes, in Conclusions of Law 6: "Further, Tareq Bin Maksud asked for identification in connection with the sale of the Mickey's Malt Liquor. (Finding of Fact ¶ 7.) There would have been no reason to do so if it were not an alcoholic beverage."

Appellant maintains that the evidence does not support a finding that the product purchased by the decoy was an alcoholic beverage, and, therefore, the Department had no basis for determining that appellant violated section 25658, subdivision (a). To

establish that the Mickey's Malt Liquor was an alcoholic beverage, appellant argues, the Department must either produce "actual evidence" at the hearing, take official notice of the fact in accordance with the provisions of section 11515 of the Government Code,[5] or establish the fact based on its expertise. It contends that the Department did none of these things and has failed to prove an essential element of the violation charged.

Appellant asserts that the Board's decision in *Godoy* (1999) AB-6992, reflects what the Department must show to sustain an accusation. In *Godoy*, the Board reversed the Department's decision, concluding that there was insufficient evidence in the record to support a finding that "Olde English 800" was an alcoholic beverage and rejecting the Department's argument that Olde English 800 was "universally known" to be an alcoholic beverage. The Board explained:

> The Department also suggests in its brief . . . that Old English 800 is universally known to be an alcoholic beverage, comparing it with Budweiser, and asserting . . . "That Olde English 800 is an alcoholic beverage is a fact of generalized knowledge requiring nothing more than the application of average intelligence."
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> It may well be true, as the Department argues, that a fact known among persons of reasonable and average intelligence will satisfy the "universally known" requirement. However, what evidence is there to establish the foundational premise - that Old English is known among persons of reasonable and average intelligence to be an alcoholic beverage? We are inclined to agree with appellant that the Department . . . is injecting its own knowledge into the record in lieu of evidence taken at the hearing.
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> If what the Department is saying is that everyone knows or should know that Olde English 800 is an alcoholic beverage, then this Board is compelled to disagree. Assuredly, Budweiser, Miller Lite, and certain other brands of beer which are widely advertised in newspapers,

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[5] Government Code section 11515 provides in pertinent part: "[i]n reaching a decision official notice may be taken, either before or after submission of the case for decision, of any generally accepted technical or scientific matter within the agency's special field. . . ."

> magazines and on national television, may enjoy such fame. Old (or Olde) English 800, at least in the experience of this Board, does not enjoy that degree of notoriety.

In *Patel* (2000) AB-7449, the Board affirmed the decision of the Department, even though a six-pack of Bud Lite purchased by a police decoy had been inadvertently destroyed before the hearing. The appellant argued there was no affirmative evidence that the police officer, who testified that beer was purchased, knew Bud Lite was beer and an alcoholic beverage. The Board agreed that affirmative evidence of the officer's knowledge was lacking, but concluded that the officer's statement that the cans he saw contained beer could not be discounted "when the product is so well-known and heavily advertised as a beer as is Bud Lite." It also agreed with the Department that it could take official notice and rely on its expertise in finding that Bud Light is an alcoholic beverage.

There was sufficient evidence presented that Mickey's Malt Liquor was purchased and that it is an alcoholic beverage. Although the can itself was not brought to the hearing, evidence was presented at the hearing on the subject. "Evidence" is defined in Evidence Code section 140 as "testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or non-existence of a fact." In the record we find:

- Exhibit 5, admitted without objection, is a photograph of the decoy pointing to the clerk who made the sale and holding a can purported to be the can of Mickey's Malt Liquor;
- The decoy testified that he went to the alcoholic beverage cooler in the store and selected "a 24-ounce can of Mickey's Malt Liquor";
- Both the police officers and the decoy testified that prior to the decoy operation, the decoy was instructed to purchase only an alcoholic beverage;
- Both Officer Trujillo and Officer Reyes testified that Mickey's Malt Liquor is an

alcoholic beverage, specifically, a type of beer;

- Officer Trujillo testified that, based on her experience, Mickey's Malt Liquor contains 5.6% alcohol by volume;
- The clerk asked for identification in connection with the sale, which he would not have done if it were not an alcoholic beverage;
- Officer Reyes testified that he took the can of Mickey's out of the bag to verify that it was an alcoholic beverage following the purchase; and
- The decoy testified that he knew that Mickey's was alcoholic because he had seen his brother get drunk after drinking it. The ALJ determined that this testimony buttressed Officer Trujillo's testimony.

This evidence is sufficient to support a finding that a can of Mickey's Malt Liquor, an alcoholic beverage, was purchased.

Appellant attempts to turn this appeal into a generalized inquiry as to whether the Department is or is not required to present proof as to each and every element of the allegation. The answer, of course, is yes, at least as to every material element. However, appellant appears to misapprehend the quantum of evidence necessary.

In the present case, the testimony and the photograph presented at the hearing were certainly sufficient to meet the Department's initial burden of going forward with the evidence to make a prima facie showing that the decoy purchased Mickey's Malt Liquor, an alcoholic beverage. At that point, the burden of producing evidence shifted to appellant. Appellant made no attempt at the hearing to object to or rebut the evidence presented, and never suggested any defense other than vague allegations that rule 141(b)(2) was violated during the decoy operation.

If appellant believed that the product sold was not Mickey's Malt Liquor, or that Mickey's Malt Liquor was not an alcoholic beverage, it was incumbent on it to produce some evidence at that point. Without such evidence, the ALJ was entitled to rely on the

evidence presented, that Mickey's Malt Liquor is an alcoholic beverage. This evidence, and, particularly, the lack of any evidence that the can contained anything other than malt liquor, is sufficient to prove that the decoy purchased an alcoholic beverage. (See, e.g., *Molina v. Munro* (1956) 145 Cal.App.2d 601, 604-605 [302 P.2d 818].)

ORDER

The decision of the Department is affirmed.[6]

BAXTER RICE, CHAIRMAN
FRED ARMENDARIZ, MEMBER
FRED HIESTAND, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[6]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.