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

AB-9230
File: 20-413532 Reg: 11074772

7-ELEVEN, INC., IQBAL KAUR, and SURINDER SINGH VIRK,
dba 7-Eleven Store #25115
552 California Boulevard, Unit A, San Luis Obispo, CA 93405,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: December 6, 2012
Los Angeles, CA

ISSUED JANUARY 16, 2013

7-Eleven, Inc., Iqbal Kaur, and Surinder Singh Virk, doing business as 7-Eleven Store #25115 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 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., Iqbal Kaur, and Surinder Singh Virk, appearing through their counsel, Ralph Barat Saltsman and D. Andrew Quigley, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

---

[1]The decision of the Department, dated December 22, 2011, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on May 15, 2002. On April 5, 2011, the Department filed an accusation against appellants charging that, on October 18, 2010, appellants' clerk, Jaggi Singh (the clerk), sold an alcoholic beverage to 19-year-old Artemisa Martinez Roa.[2] Although not noted in the accusation, Martinez was working as a minor decoy for the San Luis Obispo Police Department at the time.

At the administrative hearing held on September 14, 2011, documentary evidence was received and testimony concerning the sale was presented by Martinez (the decoy); by Keith Storton and Cory Pierce, San Luis Obispo police officers; and by Muninder Virk, a manager at the licensed premises.

Testimony established that on October 18, 2010, one of the police officers, Cory Pierce, entered the licensed premises, followed shortly thereafter by the decoy. The decoy went to the cooler and selected a six-pack of Bud Light beer in cans, which she took to the counter. The clerk scanned the beer and asked for her identification. The decoy handed him her California driver's license, which he observed for a few seconds before completing the sale. The clerk did not ask any age-related questions, and the sale was observed by Officer Pierce. After exiting the store with the beer, the decoy reentered the premises with the police officers and made a face-to-face identification of the seller. The clerk was issued a citation and was subsequently fired.

The Department's decision determined that the violation charged was proved and no defense to the charge was established.

---

[2]As noted by the ALJ in footnote 2 of the decision: "Although the decoy did not express a preference in her testimony, she was referred to alternately as Ms. Martinez (per the Spanish convention) or Ms. Martinez-Roa. For consistency, she will be referred to as Ms. Martinez. . . ."

Appellants then filed a timely appeal contending: (1) The ALJ abused his discretion by summarily approving the Department's recommended penalty; and (2) the ALJ abused his discretion by failing to connect the findings regarding the decoy's appearance to his conclusion that there was compliance with rule 141(b)(2).[3]

DISCUSSION

I

Appellants contend that The ALJ abused his discretion by summarily approving the Department's recommended penalty "without connecting the evidence to the findings and the findings to the conclusion." (App.Br. at p. 6.)

Appellants assert that the ALJ did not comply with the California Supreme Court's holding in *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506 [113 Cal.Rptr. 836] (*Topanga*), that the agency's decision must set forth findings to "bridge the analytic gap between the raw evidence and ultimate decision or order."

This Board has addressed a similar contention in prior appeals:

> 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*

[3]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.

> *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*.

(*7-Eleven, Inc. & Swanson* (2005) AB-8276, quoting from *7-Eleven, Inc. & Cheema* (2004) AB-8181.)

In the "Penalty" section of the proposed decision, the ALJ found as follows:

> The Department requested that the Respondents' license be suspended for 10 days, arguing that the Respondents' 6 years of discipline-free operation warranted some mitigation. The respondents argued that additional mitigation was warranted and that a 10-day suspension, with 5 days stayed, was appropriate, if the accusation were sustained. The penalty recommended herein complies with rule 144.

Appellants maintain "the ALJ failed to consider all of the relevant evidence, and fails to connect the raw evidence to his findings, and the findings to his conclusion." (App.Br. at p. 8.) They allege that the ALJ "failed to consider the positive action taken by the Respondent to correct the perceived problem . . . and the documented training of the licensee and employees. . . ." (*Ibid*.)

As the Board has said many times before, there is no requirement that the ALJ explain his reasoning. 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].) Simply because the ALJ does not explain his analytical process does not invalidate his determination or constitute an abuse of discretion. In any event, a 10-day suspension *is* a mitigated penalty. The fact that appellants believe greater mitigation was warranted does not make the ALJ's determination wrong.

The Department has wide discretion in determining appropriate discipline for

licensee misconduct. (*Martin v. Alcoholic Bev. Control Appeals Bd.* (1959) 52 Cal.2d 287, 299 [341 P.2d 296].) "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 Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Appellants' disagreement with the penalty imposed does not mean the Department abused its discretion. Whether or not the decision includes a discussion of *all* possible mitigating factors presented is irrelevant. We are unaware of anything in the law that requires such a discussion, nor do appellants refer us to any such authority. This Board's review of a penalty looks only to see whether it can be considered reasonable, not what considerations or reasons led to it. If it is reasonable, our inquiry ends there.

II

Appellants contend that the ALJ abused his discretion by failing to connect the findings regarding the decoy's appearance to his conclusion that there was compliance with rule 141(b)(2).[4] They allege that the decision "makes numerous findings that pertain to the decoy's appearance, all of which indicate that the decoy's appearance did not comply with Rule 141(b)(2), yet the ALJ reaches the opposite conclusion." (App.Br. at p. 8.)

When an appellant contends that the findings are not supported by the evidence, the standard of review is as follows:

---

[4]Rule 141(b)(2) provides: "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."

> In examining the sufficiency of the evidence, all conflicts must be resolved in favor of the department, and all legitimate and reasonable inferences indulged in to uphold its findings if possible. When findings are attacked as being unsupported by the evidence, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the department. (See 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 245, pp. 4236-4238.)

(*Kirby v. Alcoholic Beverage Control Appeals Board* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815].)

"Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821, 826-827 [40 Cal.Rptr. 666].)

The ALJ made the following findings about the decoy's appearance in Findings

of Fact 5 and 11:

> FF 5. Martinez appeared and testified at the hearing. On October 18, 2010 she was 5' 6" tall and weighed approximately 145 pounds. Her hair was pulled back into a bun, she wore diamond stud earrings, and she had on a little mascara. She was wearing a black top, a white jacket with a fur-trimmed hood, blue jeans, and black running shoes. The hood was down the entire time she was inside the Licensed Premises. (Exhibits 3 and 4.) Her height at the hearing was the same, but she weighed approximately 5 pounds more. She wore slightly more mascara than she had worn inside the Licensed Premises.
>
> FF 11. Martinez appeared her age at the time of the decoy operation. Based on her overall appearance, i.e., her physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in front of Singh at the Licensed Premises on October 18, 2010, Martinez displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Singh.

Appellants argue that this case is like *Garfield Beach* (2012) AB-9178, in which, they maintain, the "ALJ made findings supporting Appellants' assertion that the decoy displayed an appearance of an individual over the age of 21." (App.Br. at p. 9.) In AB-9178, however, the critical issue was not that the Board agreed with appellants on some points, but, rather, that the Board found that no specific finding had been made that the decoy displayed the appearance which could generally be expected of a person under 21 years of age. We said, "the Board cannot accord deference when no factual determinations have been made." The instant matter is a very different case.

Here, by contrast, the ALJ made specific and detailed findings (see FF 5 and 11, *supra*) to support his conclusion in Conclusions of Law 5:

> CL 5. . . . With respect to rule 141(b)(2), the Respondent argued that Martinez did not have the appearance generally expected of a person under the age of 21 based on her physical appearance, her "stonewall" face, and her training as an Explorer. This argument is rejected. As set

> for the above, Martinez had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 11.) . . .

Rule 141(b)(2) requires an ALJ to make a subjective judgment, on the evidence presented, whether the decoy displayed to the seller of alcoholic beverages the appearance generally expected of a person under the age of 21. Where there is no evidence that the decoy's appearance changed substantially between the time of the sale and the hearing, the ALJ's observation of the decoy at the hearing provides sufficient evidence on which to base a finding. *(GMRI, INC.* (2004) AB-7336c.)

Appellants are asking this Board to reweigh the ALJ's factual determination. However, appellants' disagreement with that determination is not sufficient to show that there has been an abuse of discretion, particularly when the ALJ has made findings to support his conclusion, as required by *Topanga, supra*. Indulging, as we must, in all legitimate inferences in support of the Department's determination, it is clear that substantial evidence supports the Department's decision.

ORDER

The decision of the Department is affirmed.[5]

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

---

[5]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.