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

AB-9254
File: 20-463263 Reg: 11075618

BLVD. 5, INC., dba Arco AM/PM
22375 Sherman Way, Canoga Park, CA 91303-1050,
Appellant/Licensee

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 17, 2013

Blvd. 5, Inc., doing business as Arco AM/PM (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for its 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 Blvd. 5, Inc., appearing through its counsel, Ralph Barat Saltsman and Autumn M. Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

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[1]The decision of the Department, dated March 16, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on February 21, 2008. On August 15, 2011, the Department filed an accusation charging that appellant's clerk, Shahjahan Tukhi (the clerk), sold an alcoholic beverage to 19-year-old Nelson Alegria, Jr. on June 10, 2011. Although not noted in the accusation, Alegria, Jr. was working as a minor decoy for the Los Angeles Police Department (LAPD) at the time.

At the administrative hearing held on January 5, 2012, documentary evidence was received, and testimony concerning the sale was presented by Alegria, Jr. (the decoy) and by Bonnie Lehigh, an LAPD officer.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense to the charge was established.

Testimony established that on June 10, 2011, an LAPD officer entered the licensed premises, followed shortly thereafter by the decoy. The decoy went to the alcoholic beverage section of the premises, selected a 23.5-ounce can of Four Loko, an alcoholic beverage, and took it to the counter. The clerk asked for identification, and the decoy handed him his California driver's license. The clerk viewed the license, told him the price, and rang up the sale, after which the decoy exited the premises.

Appellant 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).[2]

[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.

DISCUSSION

I

Appellant contends 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. 5.)

Appellant asserts 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.)
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> 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*.

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

Indeed, the Board has repeatedly rejected what have become tiresome,

repetitive arguments by counsel based on the supposed authority of *Topanga* when it is plainly not apposite. The purpose of an appellate brief is to assist the Board in making a correct and just decision in the case before it. To that end, counsel should be attentive to the fundamental rule that "cases are not authority for propositions not considered." (*People v. Gilbert* (1969) 1 Cal.3d 475, 482, fn. 7 [82 Cal.Rptr. 724].) "The holding of a decision is limited by the facts of the case being decided, notwithstanding the use of overly broad language by the court in stating the issue before it or its holding or in its reasoning." (*McGee v. Superior Court* (1985) 176 Cal.App.3d 221, 226 [221 Cal.Rptr. 421].) *Topanga* addressed a zoning variance, which does not involve a penalty and is unhelpful on the question of whether the agency must provide findings in support of the particular penalty imposed (as opposed to findings in support of the conclusion that misconduct has occurred). *Williamson v. Board of Medical Quality Assurance* (1990) 217 Cal.App.3d 1346 [266 Cal.Rptr. 520] (*Williamson)*, however, does involve a penalty — the revocation of a medical license following a showing of misconduct. *Williamson* makes clear that section 11518 of the Government Code does not require findings as to the penalty imposed. (*Id*. at 1346.) For counsel to cite broad language from an inapposite supreme court opinion (*Topanga*) as authority for a proposition that is countered by a pertinent appellate opinion on that very point (*Williamson*), one counsel does not mention, is unhelpful to the Board and detrimental to counsel's client. In stating our displeasure with attempts to stretch *Topanga* beyond its reasonable reach, we hope to deter counsel appearing before us from doing so in the future.

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

> The Department requested that the Respondent's license be suspended for a period of 15 days. The Respondent did not recommend a penalty in the event that the accusation were sustained. There was no evidence of aggravation presented by the Department nor was there any evidence of mitigation presented by the Respondent. The penalty recommended herein complies with rule 144.

Appellant maintains "the ALJ fails to state any substantive legal or factual reason for his conclusion regarding penalty. Thus the ALJ fails to connect the raw evidence to his findings, and the findings to his conclusion." (App.Br. at p. 6.)

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*, *supra.)* 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 15-day suspension is the standard penalty contemplated by rule 144[3] for a licensee's first sale-to-minor incident.

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].)

Appellant's disagreement with the penalty imposed does not mean the Department abused its discretion. 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.

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[3]Cal. Code Regs., tit. 4, §144.

If it is reasonable, our inquiry ends there.

II

Appellant contends 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] It alleges 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:

> 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.*

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[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."

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 finding about the decoy's appearance in Findings of Fact 10:

> FF 10. Alegria 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 Tukhi at the Licensed Premises on June 10, 2011, Alegria displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Tikhi.

Appellant argues that this case is like *Garfield Beach* (2012) AB-9178, in which, it maintains, 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. 7.) 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 10, *supra*) to support his conclusion in Conclusions of Law 5:

> CL 5. The Respondent argued that the decoy operation at the Licensed Premises failed to comply with rules 141(b)(2) and 141(b)(5)[fn. omitted] and, therefore, the accusation should be dismissed pursuant to rule 141(c). With respect to rule 141(b)(2), the Respondent argued that Alegria's physical appearance was misleading – his experience and demeanor gave him an air of maturity inconsistent with that of a minor. This argument is rejected. As set forth above, Alegria had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 10.)

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.)

Appellant is asking this Board to reweigh the ALJ's factual determination. However, appellant's 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.