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

AB-9668
File: 20-447767; Reg: 17085407

7-ELEVEN, INC. and AMBER, INC.,
dba 7-Eleven Store #13576
698 H Street, Chula Vista, CA 91910-4219,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: August 2, 2018
Los Angeles, CA

ISSUED AUGUST 20, 2018

Appearances: *Appellants:* Donna J. Hooper, of Solomon, Saltsman & Jamieson, as counsel for 7-Eleven, Inc. and Amber, Inc.,

Respondent: Jonathan V. Nguyen, as counsel for Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and Amber, Inc., doing business as 7-Eleven Store #13576, appeal from a decision of the Department of Alcoholic Beverage Control,[1] suspending their license for 10 days because their clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on February 1, 2007, and there is no record of prior departmental discipline against the license.

[1]The decision of the Department, dated September 26, 2017, is set forth in the appendix.

On March 13, 2017, the Department filed an accusation against appellants charging that, on August 5, 2016, appellants' clerk, Jose Enrique Angulo (the clerk), sold an alcoholic beverage to 19-year-old Alexis Lopez. Although not noted in the accusation, Lopez was working as a minor decoy in a joint operation between the Chula Vista Police Department and the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on August 1, 2017, documentary evidence was received and testimony concerning the sale was presented by Lopez (the decoy); by Jesse Vincente, a Chula Vista Police police officer; and by one of the licensees, Gurkirpal Morrow, president of Amber, Inc.

Testimony established that on August 5, 2016, the decoy entered the licensed premises, followed shortly thereafter by Officer Vincente and Department Agent Sarah Hudson. The decoy went to the coolers and selected a six-pack of Bud Light beer in bottles which she took to the sales counter. She waited in line behind one person, then set the beer down. The clerk scanned the beer and was prompted by the register to ask for identification. The clerk did not ask for identification. Instead, he pressed a “Visual ID OK” bypass button on the screen. The clerk then completed the sale without asking any age-related questions.

The decoy exited the premises, followed by Agent Hudson. Officer Vincente remained in the store. He identified himself to the clerk as a police officer and explained the violation to him. The clerk was asked to step out from behind the register.

The decoy re-entered the premises and was asked by Officer Vincente to identify the person who had sold her the beer. The decoy pointed at the clerk and said “He did.” The decoy and clerk were standing approximately three feet apart and facing each other during the identification. A photo of the two of them was taken (exh. 2) and the clerk was subsequently issued a citation. These facts are not at issue in this appeal.

The administrative law judge (ALJ) submitted a proposed decision on August 2, 2017,

sustaining the accusation and recommending that the license be suspended for 10 days. The Department adopted the decision in its entirety and issued its decision on September 26, 2017.

Appellants then filed a timely appeal contending the ALJ failed to proceed in a manner required by law by not considering mitigating circumstances when determining the penalty and by failing to articulate the reasoning supporting her penalty decision. These issues will be considered together.

DISCUSSION

Appellants contend that the ALJ failed to proceed in a manner required by law by not considering mitigating circumstances when determining the penalty and by failing to articulate the reasoning supporting her penalty decision. As a result, appellants argue the decision must be reversed. (AOB at pp. 5-10.)

The Board will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) "Abuse of discretion" in the legal sense is defined as discretion exercised to an end or purpose not justified by and clearly against reason, all of the facts and circumstances being considered. [Citations.] (*Brown v. Gordon*, 240 Cal. App. 2d 659, 666-667 (1966) [49 Cal. Rptr. 901].) 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 its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Rule 144[2] provides:

[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.

> In reaching a decision on a disciplinary action under the Alcoholic Beverage Control Act (Bus. and Prof. Code Sections 23000,et seq.), and the Administrative Procedures Act (Govt. Code Sections 11400, *et seq*.), the Department shall consider the disciplinary guidelines entitled "Penalty Guidelines" (dated 12/17/2003) which are hereby incorporated by reference. Deviation from these guidelines is appropriate where the Department in its sole discretion determines that the facts of the particular case warrant such a deviation - such as where facts in aggravation or mitigation exist.

(Cal. Code Regs., tit. 4, § 144.) Among the mitigating factors provided by the rule are the length of licensure without prior discipline, positive actions taken by the licensee to correct the problem, cooperation by the licensee in the investigation, and documented training of the licensee and employees. Aggravating factors include, *inter alia*, prior disciplinary history, licensee involvement, lack of cooperation by the licensee in the investigation, and a continuing course or pattern of conduct. (*Ibid*.)

The Penalty Policy Guidelines further address the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

> **Penalty Policy Guidelines:**
>
> The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.

(*Ibid*.)

In the decision, the ALJ devotes a separate section to the issue of penalty:

> The Department requested the Respondents' license be suspended for a period of 15 days, addressing that any mitigation by Respondents was taken after the minor decoy operation of August 5, 2016, and that Mr. Morrow was an absentee licensee prior to the said decoy operation admitting to not being involved in the day-to-day operations prior thereto. The Repondents argued that, if the accusation were not dismissed, a mitigated penalty of five (5) days stayed was appropriate, or requested that any penalty be stayed, given Respondents were discipline-free since 2007 and took immediate action after the said decoy operation to remove the "Visual ID OK" button from the register and Mr. Morrow personally retrained the employees relating to the sale of alcoholic beverages to prevent future sales to minors. A mitigated penatly is warranted given the length of discipline-free licensure. The penalty recommended herein complies with rule 144.

(Decision, at pp. 5-6.)

Appellants argue that additional evidence of mitigation was presented at the hearing but was not considered: namely, that the offending clerk was fired and that all the employees were personally retrained by the licensee. Appellant contends that these efforts should have been considered as additional positive actions by the licensees to correct the problem — meriting additional mitigation of the penalty. Appellants contend the ALJ gave no weight to those actions and only considered the length of licensure without discipline and the removal of the Visual ID OK button as factors in mitigation. (AOB at p. 6.)

In addition, appellants question whether the comment about being an "absentee licensee" was considered as an aggravating factor. They assert that this statement is unsupported by the evidence and should not have been considered.

Finally, appellants complain that the ALJ failed to construct an "analytical bridge" connecting the evidence and the penalty assigned, in violation of *Topanga* which states: "[I]mplicit in [the law] 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 Assn. for a Scenic Community v. Co. of Los Angeles* (1974) 11

Cal.3d 506, 515 [113 Cal.Rptr. 836].)

Unless some statute requires it, an administrative agency's decision need not include findings with regard to mitigation. (*Vienna v. Cal. 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].) Appellants have 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. Bd. of Med. Quality Assurance* (1990) 217 Cal.App.3d 1343, 1346-1347 [266 Cal.Rptr. 520].)

This Board has repeatedly rejected the very same interpretation of *Topanga* that appellants now advocate. (See, e.g., *Mtanos Hawara & Susan Issa Hawara* (2015) AB-9512 at pp. 7-9; *Garfied Beach CVS, LLC/Longs Drug Store Cal., LLC* (2013) AB-9236, at pp. 3-4.) With regard to factual findings supporting the actual charges — *not* the penalty imposed — this Board has said:

> If this Board observes that the evidence appears to contradict the findings of fact, it will review the ALJ's analysis — assuming some reasoning is provided — to determine whether the ALJ's findings were nevertheless proper. Should this Board be faced with evidence clearly at odds with the findings and no explanation from the ALJ as to how he or she reached those findings, this Board will not hesitate to reverse. . . . . While an ALJ may better shield himself against reversal by thoroughly explaining his reasoning, he is not required to do so. The omission of analysis alone is not grounds for reversal, provided findings have been made.

(*Garfield Beach CVS, LLC/Longs Drug Stores Cal., LLC* (2015) AB-9514, at pp. 6-7.) However, the Board has firmly clarified that it will not widen this holding to include the penalty:

> We emphasize that this above language does *not* extend to the penalty. No

> "analytical bridge" of any sort is required in imposing a penalty. Provided the penalty is reasonable, this Board will have no cause to retrace the ALJ's reasoning.

(*Hawara, supra* at p. 9.)

Appellant's disagreement with the penalty imposed does not mean the Department abused its discretion. As we have said time and again, this Board's review of a penalty looks only to see whether it can be considered reasonable, and, if it is reasonable, the Board's inquiry ends there. In this case, the penalty was not only within the guidelines of rule 144, it was mitigated by the ALJ to make it more reasonable in light of the length of licensure without discipline and actions taken by the licensee to correct the problem. (See Cal. Code Regs., tit. 4, § 144, *supra.*)

We see no grounds to reconsider the penalty, let alone reverse the entire decision.

ORDER

The decision of the Department is affirmed.[3]

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[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.