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

AB-8889
File: 21-399535 Reg: 07067499

SFC MARKETPLACE, INC., dba Seafood City
3495 Sonoma Boulevard, Fairfield, CA 94590,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: July 2, 2009
San Francisco, CA

ISSUED DECEMBER 1, 2009

SFC Marketplace, Inc., doing business as Seafood City (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 SFC Marketplace, Inc., appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and Alicia R. Ekland, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kelly Vent.

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[1]The decision of the Department, dated May 13, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on May 28, 2003. On December 17, 2007, the Department filed an accusation charging that appellant's clerk sold a six-pack of Heineken beer, an alcoholic beverage, to 18-year-old William Swartz on November 2, 2007. Although not noted in the accusation, Swartz was working as a minor decoy for the Vallejo Police Department at the time.

At the administrative hearing held on April 4, 2008, documentary evidence was received, and testimony concerning the sale was presented by Swartz (the decoy) and by Rick Wizner, a Vallejo police officer. The decoy testified that when he placed the beer on the counter, the clerk asked for his identification and he handed her his valid California driver's license showing him to be 18 years of age. The clerk looked at the driver's license and then showed it to another employee standing nearby. The clerk and the other employee talked to each other, but too quietly for the decoy to hear what was said. At the hearing, the decoy answered affirmatively when asked if it appeared to him that the clerk was confused "as to [his] age." [RT 35.] The clerk handed the driver's license back to the decoy and completed the sale.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established. Appellant filed an appeal contending: (1) The decoy operation was not conducted in a fashion that promoted fairness, violating Department rule 141(a)[2]; and (2) the administrative law judge (ALJ) did not provide the analysis required by *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506 [113 Cal.Rptr. 836].

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[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 the decoy operation violated rule 141(a), which requires a decoy operation to be conducted "in a fashion that promotes fairness." The violation occurred, according to appellant, when the decoy did not "correct the clerk's confusion regarding his driver's license." (App. Br. at p. 4.) Appellant cites the appeal of *Equilon Enterprises, LLC* (2002) AB-7845 (*Equilon*), in support of this contention.

In *Equilon*, *supra*, while examining the decoy's identification, the clerk said “Born in 1981. You check out okay.” Agreeing it was unfair in that situation for the decoy not correct the clerk's misconception, the Board said:

> [W]here there has been *a verbalization of the seller’s thought processes* such as that in this case, a decoy may be expected to respond. Rule 141 says that a decoy is required to respond to a question. As the Board has said in an earlier case, there may be a thin line between what is a statement and what is a question. And when that line blurs, and the *verbalization borders on the ambiguous*, it may well be that a response is required. [Italics added.]

In the present case, there was no "verbalization of the seller's thought processes," at least not any that the decoy heard. A decoy is not expected to read a clerk's mind. Whether or not the clerk in this case was confused, she did not say anything to the decoy that would require him to respond.

Equilon, *supra*, is not pertinent to the present appeal. There was no showing of unfairness. Rule 141(a) was not violated.

II

Appellant contends the ALJ failed to provide an analysis that "bridge[d] the analytic gap between the raw evidence and ultimate decision or order" as required by *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11

Cal.3d 506 [113 Cal.Rptr. 836] (*Topanga*). Appellant asserts that the Board must reverse a Department decision that does not "set forth the reasoning, grounds, and patterns of thought causing the Department to decide that the penalty levied is rational and legally sufficient," citing the Board's decision in *Silva & Morris* (2001) AB-7721.

Appellant's assertion that *Topanga*, *supra*, requires some analysis or explanation to support a finding is simply wrong. The Board has addressed and rejected similar contentions in prior appeals. 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. 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*.

The language appellant relies on from *Silva & Morris*, *supra*, was explicitly overruled in *United El Segundo* (2007) AB-8517, in footnote 3:

> Appellant also relies on the Appeals Board's decision in *Silva & Morris* (2001) AB-7721, where the Board stated that "The reasoning of the *Topanga* case demands that the Department set forth the reasoning, grounds, and patterns of thought which caused the Department to decide that the penalty levied is rational and legally sufficient." On its face, the language of *Silva & Morris* does not stand up to scrutiny, since it dealt with a penalty determination, while *Topanga* applies only to the factual findings in an administrative decision. The language quoted from *Silva &*

Morris was implicitly overruled by the analysis of *7-Eleven, Inc./Cheema*, quoted in the text, and we now specifically reject and overrule that language as an erroneous statement of the law.

Appellant's contention is meritless.

ORDER

The decision of the Department is affirmed.[3]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[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.