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

AB-8922
File: 47-188962 Reg: 07067458

HENNESSEY'S TAVERN, INC., dba The Lighthouse Café
30 Pier Avenue, Hermosa Beach, CA 90254,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: June 4, 2009
Los Angeles, CA

ISSUED AUGUST 19, 2009

Hennessey's Tavern, Inc., doing business as The Lighthouse Café (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 10 days, all stayed for a probationary period of one year, 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 Hennessey's Tavern, 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, David W. Sakamoto.

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[1]The decision of the Department, dated August 6, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on September 12, 1986. On December 19, 2007, the Department filed an accusation charging that appellant's bartender, Elizabeth Beatt, sold an alcoholic beverage to 17-year-old Lauren Brennan on October 19, 2007. Brennan was working as a minor decoy for the Hermosa Beach Police Department at the time.

At the administrative hearing held on June 6, 2008, documentary evidence was received, and testimony concerning the sale was presented by Brennan (the decoy) and by Donavan Sellan, an Hermosa Beach police officer.

Brennan and another decoy, identified only as Michael, went to the licensed premises, but were stopped at the front door by two employees who asked to see their identification. Brennan and Michael presented their drivers' licenses; the employees both looked at the licenses and let them enter.

Brennan and Michael went in and sat at the bar, where Brennan ordered a Corona beer and Michael ordered a glass of water from a bartender, later identified as Beatt. Beatt served the beer to Brennan and the water to Michael. Beatt did not ask Brennan's age or for identification.

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 administrative law judge (ALJ) ignored evidence showing the decoy appeared to be over the age of 21, and (2) the decoy operation was not conducted in a manner that promoted fairness, as required by rule 141(a)[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 the decision must be reversed because the ALJ failed to consider evidence presented at the hearing about the decoy's experience as an Explorer with the Hermosa Beach Police Department. Failing to consider this evidence, appellant asserts, means that the ALJ did not "provide sufficient reasoning" to support his finding that the decoy appeared to be under the age of 21. Appellant equates this with a failure to provide the "analytical bridge" between the evidence and the conclusions that is required by *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506 [113 Cal.Rptr. 836] (*Topanga*). To demonstrate the analytical bridge, appellant asserts, the Appeals Board said in *Silva & Morris* (2001) AB-7721, that the decision must set out "the reasoning, grounds, and patterns of thought" the ALJ used to reach the decision.

Appellant's argument is meritless. The ALJ does not need to provide reasoning to support his finding that the decoy appeared to be under the age of 21. The ALJ is able to observe the decoy and make the finding regarding the decoy's apparent age based on that observation; it is an inherently subjective determination. (See, e.g., *Askar & Mbarkeh* (2004) AB-8182; *GMRI, Inc*. (2004) AB-7336c; *Von's Companies, Inc.* (2003) AB-7949.) As the Board said in *O'Brien* (2001) AB-7751:

> An ALJ's task to evaluate the appearance of decoys is not an easy one, nor is it precise. To a large extent, application of such standards as the rule provides is, of necessity, subjective; all that can be required is reasonableness in the application. As long as the determinations of the ALJ's are reasonable and not arbitrary or capricious, we will uphold them.

In any case, appellant's assertion that *Topanga*, *supra*, requires some analysis or explanation to support a finding is also wrong. The Board addressed a similar contention in *7-Eleven, Inc. & Cheema* (2004) AB-8181:

> 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* (2001) AB-7721, 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.

It is appellant's contentions, not the Department's decision, that are deficient in analysis. None of the contentions provide a basis for questioning, much less reversing, the Department's decision.

II

Appellant contends that the decoy operation was not conducted in a fashion that promotes fairness, as required by rule 141(a), because two decoys were used and the Department did not provide evidence that Michael, the second decoy, appeared to be under the age of 21. Without such evidence regarding the second decoy, appellant asserts, it cannot be determined that the decoy operation was fair.

The Board has considered a number of cases in which two decoys entered a premises but only one attempted to purchase an alcoholic beverage. In *7-Eleven/Janizeh* (2002) AB-7790, the Board said:

> [T]he real question to be asked when more than a single decoy is used is whether the second decoy engaged in some activity intended or having the effect of distracting or otherwise impairing the ability of the clerk to comply with the law.

In *7-Eleven/Mousavi* (2002) AB-7833, the Board noted that it had sometimes found "two-decoy" cases fair and sometimes unfair, explaining:

> Unfairness has generally been found where the presence of the second decoy was obviously distracting or created the impression that the purchasing decoy was old enough to purchase the alcoholic beverage. The presence of two decoys, by itself, has not been enough to find a decoy operation unfair.

In the present case, there was no evidence presented that the second decoy did anything to distract or confuse the bartender. The bartender did not testify, and the only thing we know about her state of mind was her admission to the police that she "made a mistake." There is not evidence of unfairness.

As for the lack of a finding regarding the appearance of the second decoy, the Board has already rejected that as a basis for reversing the Department's decision. In *The Von's Companies, Inc*. (2002) AB-7819, one decoy, El-Murr, who made the

purchase of an alcoholic beverage, was accompanied by another decoy, Steiner, who did not appear at the hearing. The appellant in that case argued that the ALJ could not, under those circumstances, determine that El-Murr's appearance was that generally to be expected of a person under the age of 21. The Board rejected that argument, saying:

> Appellant is correct that the ALJ could not make a finding that Steiner's appearance complied with Rule 141(b)(2), since Steiner was not at the hearing, and the only evidence as to his appearance was testimony that he was clean-shaven that night and estimating his height and weight. However, since the only "decoy" was El-Murr, the ALJ did not need to make such a finding.

Similarly, the presence of Michael, the second decoy, was not necessary in the present case. There is no evidence that Michael's presence affected the apparent age of Brennan, the decoy.

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.