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

AB-9228
File: 21-479501 Reg: 11075136

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy #9562
3981 Irvine Boulevard, Irvine, CA 92602,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

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

ISSUED JANUARY 16, 2013

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy #9562 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 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 Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, appearing through their counsel, Ralph Barat Saltsman and D. Andrew Quigley, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kimberly J. Belvedere.

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[1]The decision of the Department, dated December 28, 2011, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 8, 2009. On May 25, 2011, the Department filed an accusation against appellants charging that, on January 21, 2011, appellants' clerk, Luzminio Isaac (the clerk), sold an alcoholic beverage to 18-year-old Shayna Allen.[2] Although not noted in the accusation, Allen was working as a minor decoy for the Irvine Police Department at the time.

At the administrative hearing held on October 4, 2011, documentary evidence was received and testimony concerning the sale was presented by Allen (the decoy), and by Kayla Wiebe, Justin Russell, and John Condon, Irvine police officers.

Testimony established that on January 21, 2011, the decoy entered the licensed premises and went to the beer coolers, where she selected a six-pack of Bud Light beer in bottles. The decoy took the beer to the cash register, placed it on the counter, and the clerk requested identification. The decoy provided her California driver's license, which contained her correct date of birth and a red stripe indicating "Age 21 in 2013." (Exh. 5.) The clerk observed the license and handed it back to the decoy without asking any age-related questions. The clerk then completed the sale and the decoy exited the premises. One police officer was inside the premises in an undercover capacity and observed the sales transaction, and a second officer observed the bottles purchased by the decoy to confirm they were beer. Subsequently, the decoy reentered the premises with two other police officers, a face-to-face identification of the clerk was

[2]The information contained in the Department's Reply Brief is incorrect: fn. 2 refers to an unidentified individual named Blanco, born on November 9, 1991, and references RT 58. This is not the decoy's name nor date of birth, and no information about this decoy is contained on page 58 of the transcript. Also, line 6 on page 2 of the Department's Reply Brief references RT 16 and 70, neither of which contain information about this decoy. Allen's date of birth is 5/22/92. [RT 69.]

made, and a citation was issued to the clerk.

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

Appellants then filed an appeal contending: (1) The ALJ abused his discretion by excluding the testimony of an ABC investigator, without allowing appellants to make an offer of proof, and (2) the ALJ abused his discretion by summarily approving the Department's recommended penalty.

DISCUSSION

I

Appellants contend that the ALJ abused his discretion by excluding the testimony of an ABC investigator without allowing appellants to make an offer of proof.

> "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 (1966) [49 Cal.Rptr. 901].)

A total of four police officers were involved in this decoy operation. At the administrative hearing, testimony was received from three of these officers: Kayla Wiebe, John Condon, and Justin Russell. Subsequent to the decoy operation, a Department investigator, Nicole Gomez, interviewed the officers involved, and prepared a decoy backtrack sheet which summarized the operation. Appellants served a subpoena on the investigator to appear at the administrative hearing. The Department moved to quash the subpoena, and asked for an offer of proof showing why the investigator needed to be called since she was not a percipient witness. The ALJ reserved ruling on the motion until the conclusion of testimony, after which he excluded the investigator's testimony on the basis that it would be cumulative and a waste of

time.

> The admission or rejection of evidence by an administrative agency is not grounds for reversal unless the error has resulted in a miscarriage of justice. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1054 [228 [*1255] Cal.Rptr. 567].) In other words, it must be reasonably probable a more favorable result would have been reached absent the error. (*Brokopp v. Ford Motor Co*. (1977) 71 Cal.App.3d 841, 853–854 [139 Cal.Rptr. 888].) Such error "'is not prejudicial if the evidence "was merely cumulative or corroborative of other evidence properly in the record," or if the evidence "was not necessary, the judgment being supported by other evidence." [Citation.]'" (*McCoy*, *supra*, 183 Cal.App.3d at p. 1054, quoting *Rue-Ell Enterprises, Inc. v. City of Berkeley* (1983) 147 Cal.App.3d 81, 91 [194 Cal.Rptr. 919].)

(*Lone Star Security & Video, Inc. v. Bureau of Security & Investigative Services* (2009) 176 Cal.App.4th 1249, 1254-1255 [98 Cal.Rptr.3d 559].)

In the instant case, the ALJ found that the testimony of the investigator would be cumulative or corroborative of other evidence. [RT 105.] In addition, the ALJ did not think it necessary to have a formal offer of proof regarding the motion to quash the subpoena of investigator Gomez, since appellants had already made clear through their arguments what they wanted to establish through that witness. [RT 106.]

The ALJ found as follows:

> Again, the reason that I indicated that I was not going to require the investigator to testify today is, one, she was not a percipient witness; she just filled out a form. You wanted to ask her about something she wrote on some decoy sheet, and you had an opportunity to cross-examine the three officers. You chose not to call a fourth officer, and you also had an opportunity to cross-examine the decoy. And the only testimony we had regarding a CVS card being scanned was by the decoy, and that's part of the record.
>
> [¶ . . . ¶]
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> She was not a percipient witness as to the decoy operation that took place. Just because she viewed the decoy at some time doesn't mean that she's a percipient witness. We have photographs regarding - - that were taken prior to decoy operation [*sic*] at the police station. We have the photograph of the decoy that was taken at the premises with the clerk,

> and we had the witness here, the decoy, so that we could observe her and ask her whatever questions we deemed appropriate, and I thought that it would be very cumulative and a waste of time to call investigator Gomez for the reasons you stated.

[RT 108-109.]

Appellants have not shown that it is reasonably probable a more favorable result would have been reached had investigator Gomez been made to testify, or that the omission of her testimony resulted in a miscarriage of justice. We believe the ALJ properly exercised his discretion in this matter.

II

Appellants contend that the ALJ abused his discretion by approving the penalty recommended by the Department "without connecting the evidence to the findings and the findings to the conclusion." (App.Br. at p. 7.)

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.)
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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.)

In Findings of Fact V, the ALJ found as follows:

> The Department's attorney recommended a penalty consisting of a fifteen day suspension. After considering all the testimony presented at the hearing and the Department's Rule 144, a determination has been made that a fifteen day suspension is an appropriate penalty in this matter.

Appellants maintain "[t]he ALJ's bare statement is thus overbroad and leaves any reviewing board without guidance as to how the ALJ actually determined that a 15-day suspension was appropriate." (App.Br. at pp. 9-10.)

There is no requirement that the ALJ explain his reasoning. The ALJ's failure to explain his analytical process does not invalidate his determination or constitute an abuse of discretion. 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].)

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].)

A suspension of appellants' license for a period of 15 days is in line with the standard penalty of rule 144 (Cal. Code Regs., tit. 4, §144), and clearly within the discretion of the Department.

ORDER

The decision of the Department is affirmed.[3]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, 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.