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

AB-9236
File: 21-477829 Reg: 11075113

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store 9320
686 Lighthouse Avenue, Monterey, CA 93940-1008,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

Appeals Board Hearing: January 3, 2013
Sacramento, CA

ISSUED FEBRUARY 5, 2013

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy Store 9320 (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, Kelly Vent.

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[1]The decision of the Department, dated January 5, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. On May 25, 2011, the Department filed an accusation against appellants charging that, on March 14, 2011, appellants' clerk, Kaylin Donovan Morris (the clerk), sold an alcoholic beverage to 18-year-old Sylvia Ramirez. Although not noted in the accusation, Ramirez was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on October 11, 2011, documentary evidence was received and testimony concerning the sale was presented by Ramirez (the decoy). Appellants presented no witnesses. The facts in this matter are not disputed, and thus are not recounted here.

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

Appellants then filed a timely appeal contending the ALJ abused his discretion by failing to bridge the analytical gap between the findings of fact and conclusion, with respect to the penalty in his decision.

DISCUSSION

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."

Appellants maintain “the ALJ failed to address the Appellant’s [sic] violation-free licensure, and failed even to conclude that a standard fifteen-day penalty was

appropriate in this matter. Rather, without any explanation whatsoever, the ALJ ordered the license suspended for fifteen days." (App.Br. at pp. 4-5.)

As the Board has said many times before, there is no requirement that the ALJ explain his reasoning. 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[2] for a licensee's first sale-to-minor incident.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. *(Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) 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 the area of its discretion." (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1965) 62 Cal. 2d 589, 594 [43 Cal.Rptr. 633].)

Unless some statute requires it, an administrative agency's decision need not include findings with regard to mitigation. (*Vienna v. California 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

[2]Cal. Code Regs., tit. 4, §144.

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].)

This Board has rejected countless attempts to stretch *Topanga* beyond its limited usefulness. *Topanga* addressed the total absence of findings. It is of no relevance to a case such as this, where the ALJ did make findings – just none which explain his reasoning regarding the penalty. In stating our displeasure with counsel's attempt to stretch *Topanga* beyond its limited holding as explicated by the facts animating that opinion, we hope to deter counsel appearing before us from doing so in the future.

Appellants appear to be operating under the mistaken notion that the Department is required to reduce a penalty if some evidence exists that can be labeled "mitigating." This is not correct. The Department's discretion, while not unfettered, is very broad, and this Board is not entitled to disturb the exercise of that discretion unless there is palpable abuse. There is nothing in rule 144 that says discipline-free licensure for a year and 11 months requires a mitigated penalty. The guidelines merely indicate that the length of licensure at the subject premises without prior discipline or problems may be considered as a mitigating factor.

Appellants' 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. If it is reasonable, our inquiry ends there.

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.