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

AB-9241
File: 21-485477 Reg: 11074742

7-ELEVEN, INC., and PAM & JAS, INC., dba 7-Eleven Store #13627
102 Leucadia Boulevard, Encinitas, CA 92024-1714,
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 17, 2013

7-Eleven, Inc., and Pam & Jas, Inc., doing business as 7-Eleven Store #13627 (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 an 18-year-old non-decoy minor, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Pam & Jas, Inc., appearing through their counsel, Ralph Barat Saltsman and D. Andrew Quigley, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

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[1]The decision of the Department, dated January 17, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on February 9, 2010. On April 5, 2011, the Department instituted an accusation against appellants charging that, on August 28, 2010, appellants' clerk, Lidia Austin (the clerk), sold an alcoholic beverage to 18-year-old Samuel Greko.

An administrative hearing was held on November 10, 2011, at which time documentary evidence was received, and testimony concerning the sale was presented by Greko and by Miguel Rios, an ABC investigator. Appellants presented no witnesses.

On the date of the sale, Investigator Rios observed Greko as he entered the premises and purchased a six-pack of beer bottles. Greko did not show any identification to the clerk. Investigator Rios stopped Greko as he exited the premises and asked his age. Greko first replied that he was twenty-one, but upon additional inquiry, admitted that he was eighteen.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no defense had been established. Per the Department’s recommendations, the ALJ imposed a 15-day suspension.

Appellants filed an appeal making the following contention: In determining the length of the suspension to be imposed, the ALJ failed to explain his reasoning. Appellants requested that the matter be remanded for additional findings.

DISCUSSION

Appellants contend that the ALJ abused his discretion and failed to proceed in the manner required by law when he accepted the Department's recommended penalty, a 15-day suspension, without explaining his reasoning.

Rule 144[2] states:

> In reaching a decision on a disciplinary action under the Alcoholic Beverage Control Act (Bus. and Prof. Code Sections 23000, *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.

(Emphasis added.)

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 is granted broad discretion in crafting a penalty. 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].) "This Board's review of a penalty looks only to see whether it can be considered reasonable, not what

[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.

considerations or reasons led to it. If it is reasonable, our inquiry ends there." (*7-Eleven, Inc. v. Ghuman & Sons, Inc.* (2011) AB-8997 at p. 4.) "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].)

Appellants argue that, pursuant to the California Supreme Court's decision in *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836], the ALJ was required to explain how each piece of evidence played upon his reasoning when imposing the 15-day penalty. (App.Br. at pp. 2, 6.) Appellants describe the absence of such explanations as a "cop out." (App.Br. at p. 6.)

Topanga, however, does not require that the ALJ explain the analytical process that connects his findings and his conclusions of law. As this Board has repeatedly noted:

> 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 the ultimate decision or order."

(*Topanga*, *supra*, 11 Cal.3d 506, 515, italics added.)

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. & Cheema* (2004) AB-8181 at pp. 6-7.)

Indeed, the Board has repeatedly rejected what have become tiresome, repetitive arguments by counsel based on the supposed authority of *Topanga* when it is plainly not apposite. The purpose of an appellate brief is to assist the Board in making a correct and just decision in the case before it. To that end, counsel should be attentive to the fundamental rule that "cases are not authority for propositions not considered." (*People v. Gilbert* (1969) 1 Cal.3d 475, 482, fn. 7 [82 Cal.Rptr. 724].) "The holding of a decision is limited by the facts of the case being decided, notwithstanding the use of overly broad language by the court in stating the issue before it or its holding or in its reasoning." (*McGee v. Superior Court* (1985) 176 Cal.App.3d 221, 226 [221 Cal.Rptr. 421].) *Topanga* addressed a zoning variance, which does not involve a penalty and is unhelpful on the question of whether the agency must provide findings in support of the particular penalty imposed (as opposed to findings in support of the conclusion that misconduct has occurred). *Williamson*, however, does involve a penalty—the revocation of a medical license following a showing of misconduct. (See *Williamson*, *supra*, 217 Cal.App.3d 221.) *Williamson* makes clear that section 11518 of the Government Code does not require findings as to the penalty imposed. (*Id.* at 1346.) For counsel to cite broad language from an inapposite supreme court opinion (*Topanga*) as authority for a proposition that is countered by a pertinent appellate opinion on that very point (*Williamson*), one counsel

does not mention, is unhelpful to the Board and detrimental to counsel's client. In stating our displeasure with attempts to stretch *Topanga* beyond its reasonable reach, we hope to deter counsel appearing before us from doing so in the future.

In this case, the ALJ made extensive findings of fact with regard to the decision to impose disciplinary action. He did not explain the reasoning behind his acceptance of the recommended 15-day suspension, nor was he required to do so. The penalty is reasonable and fully within the ALJ's discretion; according to the guidelines of rule 144, it is precisely the penalty recommended for a first violation. We can find no abuse and see no reason to remand the matter.

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.