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

AB-9225
File: 20-442436 Reg: 11074885

KHANDOKER TAHAMINA SULTANA, dba Azteca Market
3370 Verdugo Road, Los Angeles, CA90065,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: November 1, 2012
Los Angeles, CA

ISSUED DECEMBER 5, 2012

Khandoker Tahamina Sultana, doing business as Azteca Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his license for 25 days for his 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 Khandoker Tahamina Sultana, appearing through his counsel, Ralph Barat Saltsman and Autumn M. Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

---

[1]The decision of the Department, dated December 15, 2011, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on July 18, 2006. On April 7, 2011, the Department filed an accusation charging that appellant's clerk, Syed Rahman (the clerk), sold an alcoholic beverage to 18-year-old Theresa Palacios on December 30, 2010. Although not noted in the accusation, Palacios was working as a minor decoy for the Los Angeles Police Department (LAPD) at the time.

At the administrative hearing held on September 27, 2011, documentary evidence was received, and testimony concerning the sale was presented by Palacios (the decoy); and by LAPD officers Raquel Trujillo and Luis Reyes.

Testimony established that the decoy went to the licensed premises on December 30, 2010 with two LAPD officers, who entered the premises first to make sure it was safe. One of the officers exited the premises prior to the entrance of the decoy, who then proceeded to the coolers, which were locked. The clerk observed the decoy looking at him from in front of the cooler, and he unlocked it from his position behind the counter. The decoy selected a 24-ounce bottle of Corona beer, and took it to the register, where the clerk completed the sale without asking for identification. A face-to-face identification of the seller was made and the clerk was issued a citation.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven and no defense had been established.

Appellant filed an appeal contending: (1) rule 141(b)(2)[2] was violated, and (2) the ALJ abused his discretion in imposing the penalty.

---

[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 that there was insufficient evidence to support a finding that the decoy possessed the appearance which could generally be expected of a person under the age of 21, as required by rule 141(b)(2).[3]

The ALJ made the following findings about the decoy's appearance in Findings of Fact 5 and 12:

> FF 5. Palacios appeared and testified at the hearing. On December 30, 2010 she was 5' tall and weighed 135 pounds. She wore her hair in a ponytail, which was draped across her shoulder. She wore a blue shirt with a black jacket over it, blue jeans, and brown boots. She wore earrings, a nose stud, and a ring on the ring finger of her left hand. (Exhibits 3-5.) At the hearing her height and weight was the same, but her hair was shorter.
>
> FF 12. Palacios appeared her age at the time of the decoy operation. Based on her overall appearance, i.e., her physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in front of Rahman at the Licensed Premises on December 30, 2010, Palacios displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Rahman.

Appellant contends that substantial evidence does not exist to support the conclusion that the decoy's appearance complied with rule 141(b)(2), and that the ALJ failed to explain how the decoy's conduct contributed to her youthful appearance. Therefore, appellant asserts, the decision violates the requirement of *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506 [113 Cal.Rptr. 836] (*Topanga*) that the Department must "bridge the gap between the

---

[3]Rule 141(b)(2) dictates: "The decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense."

raw evidence presented . . . and the ultimate conclusion." (App.Br. at p. 3.)

The ALJ observed the decoy in person, and this Board has long held that this provides substantial evidence to support the determination of the decoy's apparent age. (*7-Eleven, Inc./Nagra & Sunner* (2004) AB-8064.)

The contention that the Department failed to comply with *Topanga* has been rejected by this Board numerous times. 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." (Accord, *No Slo Transit, Inc. v. City of Long Beach* (1987) 197 Cal.App.3d 241, 258-259 [242 Cal.Rptr. 760]; *Jacobson v. County of Los Angeles* (1977) 69 Cal.App.3d 374, 389 [137 Cal.Rptr. 909].)

Appellant is really demanding the Department's reasoning. As this Board has explained many times, the Department is not required to explain its reasoning.

> The California Supreme Court made clear in *Fairfield v. Superior Court of Solano County* (1975) 14 Cal.3d 768, 778-779 [122 Cal.Rptr. 543], that as long as findings are made, a party is not entitled to attempt to delve into the reasoning process of the administrative adjudicator:
>
> > As we stated in *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836, 522 P.2d 12]: "implicit in [Code of Civil Procedure] 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."[Fn.]
> >
> > In short, in a quasi-judicial proceeding in California, the administrative board should state findings. If it does, the rule of *United States v. Morgan* [(1941)] 313 U.S. 409, 422 [85 L.Ed. 1429, 1435 [61 S.Ct. 999]] precludes inquiry outside the administrative record to determine what evidence was considered, and reasoning employed, by the administrators.

(*United El Segundo, Inc*. (2007) AB-8517.)

Appellant has not shown that substantial evidence was lacking nor that it is entitled to additional analysis.

II

Appellant contends secondly that the ALJ abused his discretion by failing to make factual findings to support his recommended penalty, and by failing to consider evidence of mitigation.

In the Penalty section of the proposed decision, the ALJ made a finding that "[T]he penalty recommended herein complies with rule 144." Appellant maintains that it was an abuse of discretion not to make specific findings on how the recommended penalty complied with the rule. As we explained, *supra*, findings need not be explained by the ALJ.

Rule 144 provides for a 25-day suspension when a licensee sells alcohol to a minor for a second time in a 36-month period, and for revocation when there is a third such incident in a 36-month period. (Cal. Code Regs., tit. 4, §144.) The licensee in this matter was given a 15-day suspension for a sale-to-minor violation in January of 2010. Appellant conceded at the administrative hearing that the penalty for a "normal second strike case" was a 25-day suspension, [RT 129], seeming to acknowledge that the instant matter is the second such incident.[4]

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

[4]There is another sale-to-minor matter pending against this licensee, registration number 11074884, which is the subject of appeal number AB-9224.

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].) Appellant has not pointed out a statute with such requirements. 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].)

Appellant does not dispute that the Department's findings support the decision that a previous sale-to-minor violation occurred in January 2010, and that the incident on December 30, 2010 would constitute the second such sale within 36 months. In addition, the ALJ made a finding that the recommended penalty complied with rule 144. Therefore, no abuse of discretion resulted from the lack of findings regarding mitigation.

Appellant appears to be operating under the mistaken notion that the Department is required to reduce a penalty if some evidence exists that can somehow 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. It is appellant's responsibility to demonstrate such abuse, and nothing in the contentions presented here reaches that level.

ORDER

The decision of the Department is affirmed.[5]

BAXTER RICE, CHAIRMAN
FRED ARMENDARIZ, MEMBER
FRED HIESTAND, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[5]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.