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

AB-9512
File: 21-411624 Reg: 14081489

MTANOS HAWARA and SUSAN ISSA HAWARA,
dba Mega 9 Liquor
716 Tennessee Street, Redlands, CA 92374,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: November 3, 2015
San Diego, CA

ISSUED DECEMBER 7, 2015

Appearances: *Appellants:* Melissa Gelbart of Solomon Saltsman & Jamieson as counsel for Mtanos Hawara and Susan Issa Hawara, doing business as Mega 9 Liquor.
Respondent: Jonathan Nguyen as counsel for the Department of Alcoholic Beverage Control.

OPINION

This appeal is from a decision of the Department of Alcoholic Beverage Control[1] suspending appellants' license for 10 days, all conditionally stayed, because their clerk sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 7, 2004. On October 27, 2014, the Department filed an accusation against appellants charging that, on June 19, 2014, appellants' clerk, Nagib Youssef (the clerk), sold an alcoholic beverage to 18-year-old Bryan

[1]The decision of the Department, dated April 13, 2015, is set forth in the appendix.

Brinkman. Although not noted in the accusation, Brinkman was working at the time as a minor decoy for the Redlands Police Department.

At the administrative hearing held on February 25, 2015, documentary evidence was received and testimony concerning the sale was presented by Brinkman (the decoy). Appellants presented no witnesses.

Testimony established that on the date of the operation, the decoy entered the licensed premises and went to a cooler, where he selected a three-can pack of Bud Light beer. The decoy took the beer to the sales counter for purchase. The clerk — later identified as Nagib Youssef — rang up the beer on the cash register. The decoy paid for the beer, received his change, and exited the store with the beer. The clerk did not ask for identification, nor did he ask any age-related questions.

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

Appellants then filed an appeal contending: (1) the Department failed to show, through substantial evidence, that the operation took place at the licensed premises or that the clerk named in the decision was in fact the clerk who sold alcohol to the minor decoy, and (2) the ALJ failed to construct an "analytical bridge" between appellants' mitigating evidence and the mitigated penalty.

DISCUSSION

I

Appellants contend that the Department failed to establish that the minor decoy purchased alcohol at the licensed premises named in the accusation. They argue that "[i]n the absence of specific testimony laying the foundation for and establishing that the testimony relates to the accused premises, neither the licensee nor the Department can be reasonably assured that testimony at the hearing related to the accused license." (App.Br. at p. 4.)

Additionally, appellants contend that the Department failed to establish that the clerk described in the decoy's testimony was the clerk named in the accusation. Appellants note that "there is no testimony on the record in this matter providing the name of the clerk." (App.Br. at pp. 4-5.)

The Department responds by pointing out that appellants did not raise this issue at the administrative hearing. It is settled law that the failure to raise an issue or assert a defense at the administrative hearing level bars its consideration when raised or asserted for the first time on appeal. (*Araiza v. Younkin* (2010) 188 Cal.App.4th 1120, 1126-1127 [116 Cal.Rptr.3d 315]; *Hooks v. Cal. Personnel Bd.* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Bd. of Med. Examiners* (1978) 81 Cal.App.3d 564, 576 [146 Cal.Rptr. 653]; *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; *Harris v. Alcoholic Bev. Control Appeals Bd.* (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167].)

The name and precise address of the licensed premises, as well as the name of the offending clerk, were listed in the accusation. (See Exhibit 1.) At no point during the administrative hearing did counsel for appellants contend that the Department had failed to carry its burden of proving the location of the operation or the identity of the clerk. Indeed, appellants made no challenge whatsoever to the facts as alleged in the accusation, but instead rested their case solely on a rule 141 affirmative defense. (See RT at p. 32.) It was reasonable for both the ALJ and Department counsel to conclude, based on appellants' failure to raise the issues, that they conceded both the correct identification of the premises and the identity of the clerk as named in the accusation. We therefore consider these issues waived.

We must add, however, that appellants' present contention that the Department failed to prove the location of the decoy operation is inaccurate. Throughout the transcript, the decoy answered questions specifically addressing his visit to the Mega 9 liquor store. For example, on direct examination, the decoy recalled his visit to the licensed premises:

> [BY MS. HOGANSON:]
> Q Do you remember visiting a Mega 9 Liquor on that night?

A Yes.

Q And why were you there?

A I was there with Redlands Police Department to purchase alcohol.

[¶ . . . ¶]

Q Had you been to this premises before?

A I believe I have in the past, but I'm not sure when.

(RT at p. 10.) While it is true that on direct examination the decoy admitted only that he visited *a* Mega 9 Liquor, not *the* Mega 9 Liquor, appellants never offered even a speculative assertion that the decoy had confused their premises with another operating under the same name.

Indeed, counsel for appellants proceeded with cross-examination without so much as hesitating over the location of the purchase:

[BY MS. ROSE]
Q So you were working as a minor decoy on June 19th, 2014; is that correct?

A Yes.

[¶ . . . ¶]

Q And you visited a Mega 9 Liquor on June 19th, 2014; is that correct?

A Yes.

[¶ . . . ¶]

Q Do you remember what time you went to the Mega Liquor, the Mega 9 Liquor?

A Approximately 8:30.

[¶ . . . ¶]

Q When you went into the Mega 9 liquor on June 19th, did you enter alone?

A Yes, I did.

[¶ . . . ¶]

Q And when you went into the Mega 9, you stated you went back to the cooler section; is that correct?

A Yes.

(RT at pp. 19-20.) The rest of cross-examination proceeded similarly, without appellants' counsel ever stating or implying that the Mega 9 Liquor the decoy described was any location other than appellants' premises:

Q You stated that you visited approximately 30 locations on June 19th.

A Yes.

Q Do you recall if Mega 9 Liquor was — or where in those 30 operations you visited the Mega 9 Liquor?

A I know it was one of the first few. I do not know which number it was in order.

[¶ . . . ¶]

Q Did you prepare for this testimony at all prior to sitting here today?

A No, I did not, other than reading the report.

Q Before you read the report, did you have a good recollection of the events that occurred —

A Yes.

Q — At the Mega 9 Liquor?

A Yes.

(RT at pp. 26-27.)

Appellants rebut the decoy's numerous references to Mega 9 Liquor by arguing that "[t]he Department never elicited testimony establishing that the "Mega 9 Liquor" testified about and to which the other factual recollections attached was, in fact, Appellants' premises, as alleged in the Accusation." (App.Br. at p. 4.) A search of the Department's license query system, however, reveals that there is only one alcoholic beverage licensee in the entire state of California operating under the fictitious business name "Mega 9 Liquor," and that is co-appellant

Hawara Mtanos.[2] The decoy recalled the name of the premises and the visit in detail; under the circumstances, we are not persuaded that his failure to recite the premises' exact street address constitutes a fatal flaw in the Department's case. The decoy's testimony regarding his purchase of alcohol at Mega 9 Liquor is therefore sufficient to establish that the operation took place at appellants' premises.

Finally, it is true that the decoy never named the clerk. Appellants, however, raised no objection to the admission of Exhibit 3. (RT at p. 18.) During direct examination, the decoy offered the following testimony regarding the photograph:

> BY MS. HOGANSON:
> Q So Mr. Brinkman, starting with the number 3. Do you recognize this photo?
>
> A Yes, I do.
>
> Q Can you tell me what this photo is?
>
> A This photo is of me and the clerk after I purchased the Bud Light from him.

(RT at p. 16.) On cross-examination, counsel for appellants made no reference whatsoever to Exhibit 3 and did not question the decoy regarding his identification of the individuals in the photograph. It is therefore undisputed that an employee of Mega 9 Liquor sold alcohol to the decoy, and that the clerk who did so is the individual pictured beside the decoy in Exhibit 3. In

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[2]The results of the Department license query system are a proper subject for judicial notice under section 452 of the Evidence Code:

> Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451:
>
> [¶ . . .¶]
>
> (h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

light of appellants' utter failure to raise the issue of the clerk's identity, it was reasonable for the ALJ to conclude that appellants had conceded that the clerk pictured was both their employee and the individual named in the accusation.

II

Appellants argue that the ALJ failed to construct an "analytical bridge" connecting the evidence and the penalty assigned. (App.Br. at p. 7.) Appellants write, "[t]he Proposed Decision violates *Topanga* by ordering a mitigated penalty, but neglects to mention evidence offered by Appellants in support of mitigation, while acknowledging evidence admitted over Appellants' objection." (*Ibid.*) Appellants do not request further mitigation of the penalty, but rather seek reversal of the decision in its entirety. (*Ibid.*)

This Board will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Bev. 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 Bev. 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. Cal. 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 imposed are not necessary as long as specific findings are made that support the decision to impose disciplinary action. (*Williamson v. Bd. of Med. Quality Assurance* (1990) 217 Cal.App.3d 1343, 1346-1347 [266 Cal.Rptr. 520].)

This Board has repeatedly rejected the very same gloss on *Topanga* appellants now

advocate here. (See, e.g., *Garfied Beach CVS, LLC/Longs Drug Store Cal., LLC* (2013) AB-9236, at pp. 3-4.) With regard to factual findings supporting the actual charges — *not* the penalty imposed — this Board has recently clarified our position:

> If this Board observes that the evidence appears to contradict the findings of fact, it will review the ALJ's analysis — assuming some reasoning is provided — to determine whether the ALJ's findings were nevertheless proper. Should this Board be faced with evidence clearly at odds with the findings and no explanation from the ALJ as to how he or she reached those findings, this Board will not hesitate to reverse. . . . . While an ALJ may better shield himself against reversal by thoroughly explaining his reasoning, he is not required to do so. The omission of analysis alone is not grounds for reversal, provided findings have been made.

(*Garfield Beach CVS, LLC/Longs Drug Stores Cal., LLC* (2015) AB-9514, at pp. 6-7.)

We emphasize that this above language does *not* extend to the penalty. No "analytical bridge" of any sort is required in imposing a penalty. Provided the penalty is reasonable, this Board will have no cause to retrace the ALJ's reasoning. As we have written time and again, "[t]his 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." (*Garfield Beach CVS/Longs Drug Stores Cal., LLC* (2013) AB-9236, at p. 4.; *7-Eleven, Inc. v. Ghuman & Sons, Inc.* (2011) AB-8997, at p. 4.)

In this case the penalty was not only reasonable, it was significantly mitigated by the ALJ to make it more reasonable. (See Cal. Code Regs., tit. 4, § 144, Penalty Guidelines.) We see no grounds to reconsider the penalty, let alone reverse the entire decision.

ORDER

The decision of the Department is affirmed.[3]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, 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.