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

AB-9624a
File: 23-452280 Reg: 16084211

HANGAR 24 CRAFT BREWERY, LLC,
dba Hangar 24 Craft Brewery
1710 Sessums Drive,
Redlands, CA 92374-1909,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: D. Huebel

Appeals Board Hearing: September 6, 2018
Ontario, CA

ISSUED SEPTEMBER 18, 2018

Appearances: *Appellant*: Donna J. Hooper, of Solomon Saltsman & Jamieson, as counsel for Hangar 24 Craft Brewery, LLC, doing business as Hanger 24 Craft Brewery.

Respondent: Jonathan Nguyen as counsel for the Department of Alcoholic Beverage Control.

OPINION

Hangar 24 Craft Brewery, LLC, doing business as Hangar 24 Craft Brewery (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] suspending its license for 25 days because its bartender sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

1. Both the original decision of the Department, dated November 21, 2016, and the Decision Following Appeals Board Decision, dated February 6, 2018, are set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's small beer manufacturer license was issued on March 13, 2008. On May 25, 2016, the Department filed a two-count accusation against appellant. Count 1 alleged that appellant's bartender,[2] Gregg Ian Glenn (the bartender), sold an alcoholic beverage to 18-year-old Kambria Carmen Noelle Dormae on January 22, 2016. Count 2 alleged that appellant's "agent or employee, an unidentified male," also sold an alcoholic beverage to Dormae. The two counts were based on the same transaction. Although not noted in the accusation, Dormae was working as a minor decoy for the Redlands Police Department at the time.

At the administrative hearing held on September 7, 2016, documentary evidence was received and testimony concerning the sale was presented by Dormae (the decoy); by Officer Dave Frisch and Detective Michael Merriman of the Redlands Police Department; by Agent Eric Burlingame of the Department of Alcoholic Beverage Control; and by Natalie Mortion, appellant's lead bartender and former assistant manager.

Testimony established that on the date of the operation, the decoy entered the licensed premises and ordered a pint of beer. The bartender asked the decoy for identification. The decoy produced her valid California driver's license. The bartender looked at the decoy's identification, then told her the cost of the beer, accepted payment, and made change. (Count 1.) A second, unidentified male employee poured the beer for the decoy. (Count 2.)

2. Appellant refers to its bartending employees as "beertenders." For clarity, this decision uses the standard nomenclature of "bartender."

After the hearing, the Department issued a decision determining the violation charged was proved and no defense was established. The decision imposed a standard penalty of 25 days' suspension, as this was appellant's second sale-to-minor violation within 36 months.[3]

Appellant then appealed to this Board. In its decision issued November 28, 2017, this Board affirmed count 1, but reversed count 2, pertaining to the unidentified employee who poured the beer, on two grounds: first, that no face-to-face identification took place, and second, that the employee who poured the beer was entitled to rely on the bartender's review of the decoy's identification. (*Hangar 24 Craft Brewery, LLC* (2017) AB-9624, at pp. 5-10.) The Board remanded the case to the Department for reconsideration of the penalty in light of the partial reversal. (*Id.* at p. 22.)

On remand, the Department[4] again imposed the standard penalty of 25 days' suspension. It found,

> This was [appellant]'s second sale of alcohol to a minor within a 36-month period. Although the [appellant] increased training and added ID scanners after the sale in this case, there is no evidence in the record as to what protective measures, if any, were adopted prior to the instant sale and following the first violation. As such, there is neither mitigation nor aggravation in this case.

(Decision Following Appeals Board Decision, at p. 1.)

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3. The prior violation took place on May 31, 2013. (See Reg. No. 13078974.) Additionally, appellant has an unrelated violation dated September 15, 2009. (See Reg. No. 10073571.) The 2009 violation was not considered in selecting the penalty.
4. On remand, the case was decided by Department Director Jacob Appelsmith. (See Decision Following Appeals Board Decision.) There was no new hearing, and no new evidence was presented.

Appellant then filed a second appeal contending the Department failed to proceed in the manner required by law when it disregarded appellant's mitigating evidence.

DISCUSSION

Appellant contends the Department failed to proceed in the manner required by law and abused its discretion when it disregarded evidence of mitigating measures taken after the instant violation. (App.Br., at pp. 6-11.)

Appellant argues the Department ignored the "plain language of the [penalty] guidelines indicat[ing] that positive actions taken after a violation occurs is [*sic*] a proper factor in mitigation." (App.Br., at p. 7; see also Penalty Guidelines, Code Regs., tit. 4, § 144.) Appellant claims there is nothing in the rule 144 penalty guidelines that suggests actions taken after a second violation should not be considered in mitigation. (App.Br., at p. 7.)

Appellants acknowledge that "[t]he standard penalty for a second violation within three years is a 25-day suspension, which is 10 days longer than the standard penalty for a first violation." (App.Br., at p. 9.) They argue, however, that in imposing the standard penalty, the Department must have been "using the simple fact of a second violation as reason not to mitigate the penalty." (*Ibid.*)

Finally, appellant contends that pursuant to *Topanga*, the Department was required to explain its reasoning. (App.Br., at pp. 9-10, citing *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836].) Appellant argues the Department failed to explain its reasons for disregarding actions taken after the violation. (App.Br., at p. 10.)

Rule 144 provides penalty guidelines for Department discipline. That rule provides, in relevant part:

> In reaching a decision on a disciplinary action under the Alcoholic Beverage Control Act [citation], and the Administrative Procedures Act [citation], 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.

(Code Regs., tit. 4, § 144, emphasis added.) The referenced penalty guidelines in turn state:

> POLICY STATEMENT
>
> It is the policy of this Department to impose administrative, non-punitive penalties in a consistent and uniform manner with the goal of encouraging and reinforcing voluntary compliance with the law.
>
> PENALTY POLICY GUIDELINES
>
> The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.
>
> Higher or lower penalties from this schedule may be recommended based on the facts of individual cases where generally supported by aggravating or mitigating circumstances.

(Code Regs., tit. 4, § 144, Penalty Guidelines.) Like the rule itself, the plain language of the penalty guidelines unequivocally entrusts the penalty to the Department's discretion.

The penalty guidelines go on to list factors that *may* be considered in aggravation or mitigation, including "[p]ositive action by licensee to correct problem." Throughout the penalty guidelines, however, the language is consistently permissive. (See generally *ibid.*) A licensee is not *entitled* to mitigation, even if it presents evidence.

Because the penalty is, by law, a matter of the Department's discretion, this Board will not disturb the Department's penalty order in the absence of an abuse of that 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].)

Moreover, 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 cited no law imposing such requirements. Findings regarding the penalty 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].)

The holding of *Topanga* 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 has 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, LLC/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 Department provided more reasoning in its penalty determination than is required by law. The Department took issue with the appellant's failure to take mitigating measures after its first sale-to-minor violation—a failure that appears to have resulted in this, its second violation in less than three years. Based on this, the Department discounted the mitigating measures appellant took after the second violation. Essentially, appellant's mitigating evidence was too little, too late. It was within the Department's discretion to reach that conclusion, and we have no authority to question it. (See Code Regs., tit. 4, § 144.)

Moreover, as appellant acknowledges, a 25-day suspension is the standard penalty for a second sale-to-minor violation within 36 months. (App.Br., at p. 9; Code Regs., tit. 4, § 144.) The penalty is reasonable; we therefore affirm.

ORDER

The decision of the Department is affirmed.[5]

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
MEGAN MCGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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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.