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

AB-8289
File: 20-371635 Reg: 03055877

7-ELEVEN, INC., ANJU BINDAL, and BILL H. BINDAL, dba 7-Eleven
1895 Farm Bureau Road, Concord, CA 94519,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Stewart A. Judson

Appeals Board Hearing: January 6, 2005
San Francisco, CA

ISSUED FEBRUARY 11, 2005

Anju Bindal and Bill H. Bindal,[1] doing business as 7-Eleven (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[2] which suspended their license for 25 days, with 15 days thereof stayed for a one-year probationary period, for appellants' 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 Anju Bindal and Bill H. Bindal, representing themselves, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

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[1]Although the Department's decision was with regard to 7-Eleven, Inc., and Anju and Bill H. Bindal, 7-Eleven, Inc., did not appeal. "Appellants" herein refers to Anju and Bill H. Bindal.

[2]The decision of the Department, dated April 22, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on December 5, 2000. On September 18, 2003, the Department filed an accusation against appellants charging that, on June 23, 2003, their clerk sold an alcoholic beverage to 19-year-old David Keys. Although not noted in the accusation, Keys was working as a minor decoy for the Concord Police Department at the time.

At the administrative hearing held on January 27, 2004, documentary evidence was received, and testimony concerning the sale and appellants' efforts to prevent sales to minors was presented. Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved, and appellants did not establish a defense.

Appellants have filed an appeal making the following contentions: The administrative law judge did not give adequate consideration to all the facts and issues, and the penalty is too harsh. These issues are related and will be discussed together.

DISCUSSION

Appellants contend the administrative law judge (ALJ) did not give sufficient consideration to some of the facts in imposing the penalty. They urge that greater significance should have been given to evidence they presented that they now require their clerks to check ID'S for all alcoholic beverage purchases, regardless of the apparent age of the purchaser; that their failure to do so previously was due to their franchisor and co-licensee, 7-Eleven, Inc. (7-Eleven), discouraging mandatory identification checking because it may reduce sales; that appellants, not 7-Eleven, are the ones who will suffer, even though it is 7-Eleven that discourages mandatory ID checking; that appellants will suffer great financial harm; that the clerk said he made

the sale after asking the decoy if he was 21 and, because of a language problem, thought that he responded affirmatively; that the City of Concord runs decoy operations more often at this store than at appellants' stores in other nearby cities; that appellants received letters from the Concord Police Department commending them for not selling to minor decoys during two prior decoy operations; and that appellants have increased training and reminders about alcoholic beverage sales for their employees, and are helping to arrange training programs for other retailers.

Appellants are challenging the penalty, asking this Board to give more weight to the factors they believe justify mitigation. 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].)

We find no abuse of discretion in the penalty imposed. The Department recommended a 25-day suspension at the conclusion of the hearing, but the ALJ considered appellants' efforts to prevent sales to minors and their successes in other decoy operations in mitigation and reduced the penalty to only 10 days of actual suspension as long as no other violations occur during a one-year probationary period. Appellants ask for leniency, but it appears the Department has already been lenient. It

would be unjustified to say that this penalty was unreasonable for a second sale-to-minor violation within eight months of the prior one.

The difficulties appellants may encounter as a consequence of the Department's decision, particularly having to sell this store, are unfortunate, but they result from the agreements appellants entered into with 7-Eleven. Some of the items mentioned by appellants could appropriately be considered in mitigation, and we believe that they were. Just because they did not result in the degree of mitigation desired by appellants does not mean that the penalty imposed was unreasonable.

In its late-filed reply brief, the Department contends, for the first time, that appellants' appeal was not timely filed. The Department bases its contention on the date its Certificate of Decision was mailed, April 22, 2004. However, the proof of service shows that only 7-Eleven, the franchisor, was served at its corporate office in Brea, California in that April 22nd mailing. The decision was not mailed to the licensed premises, but, on May 27, 2004, another proof of service shows the decision was mailed to Bill Bindal at an address in Alamo, California. If May 27th is considered the date of service of the decision, the appeal filed on June 7, 2004, by Bill Bindal was timely.

Each party must be served with a copy of the Department's decision. (Gov. Code, § 11517, subd. (e).) The date of service determines the date by which reconsideration must be ordered (Gov. Code, § 11521) and thus the date by which an appeal must be filed with this Board. (Bus. & Prof. Code, § 23081.)

It seems self-evident to us that since appellants were not served until May 27, as to them, the time for reconsideration or appeal could not, consistent with due process, begin to run until that date. Appellants had no notice until May 27. Once they received notice, they filed their appeal well within the time required. The Board accepted the

appeal as timely and the Department did not file a motion to dismiss. The Department cannot now assert that by serving notice on only one party, they can cut off the rights of the other party.

We also note that, as stated by appellants in their brief, they have already served a 10-day suspension. The Department, again relying on the April 22nd date, had notified appellants that an investigator would pick up the license and post the premises on June 8, 2004. On that date, the Department had no evidence that an appeal had been filed, so the license was taken and the notice of suspension was posted. On June 16, 2004, the Department notified the Oakland District Office that an appeal had been filed, and the licensee was notified on June 17th, the tenth day of the suspension, that the posting could be removed.

The Department agrees that appellants have already served the 10-day suspension ordered in the Department's decision. (The additional 15 days of suspension remain stayed for the one-year probationary period.)

ORDER

The decision of the Department is affirmed.[3]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[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.