

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

AB-8437a

File: 20-371143 Reg: 04059254

7-ELEVEN, INC., and SHIZI ITO dba 7-Eleven #2237-20304B
455 West Grantline, Tracy, CA 95376,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Michael B. Dorais

Appeals Board Hearing: January 11, 2007
Sacramento, CA

ISSUED APRIL 5, 2007

7-Eleven, Inc., and Shizi Ito, doing business as 7-Eleven #2237-20304B (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk having sold an alcoholic beverage to a minor, a violation of Business and Professions Code section 25658, subdivision (a).²

Appearances on appeal include appellants 7-Eleven, Inc., and Shizi Ito, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John Peirce.

FACTS AND PROCEDURAL HISTORY

This is the second appeal in this matter. In the initial appeal, the Appeals Board

¹The Decision of the Department Following Appeals Board Decision, dated July 31, 2006, is set forth in the appendix.

affirmed all aspects of the Department's decision except that relating to penalty. The Board concluded that the ALJ had premised his conclusion that penalty mitigation was inappropriate on an incorrect determination of the period of time the licensees had been free of discipline. Department counsel had urged a 15-day suspension, while appellants' counsel requested a stay of the entire 15-day suspension. The ALJ found no basis for mitigation from the fact that appellants had operated free of discipline for over two and one-half years. In fact, appellants had been free of discipline for three years and approximately eight months.

In remanding the case to the Department for reconsideration of the penalty, the Board stated:

There is no certainty that, had the ALJ's computations had been correct, he would have imposed a lesser penalty. We are not in a position to say that a three year and nine month period free of discipline automatically constitutes mitigation. At the same time, we cannot affirm a penalty based on a mistaken premise.

We think it more appropriate that the case be remanded to the Department for reconsideration of the penalty, using the undisputed period of discipline-free operation as a consideration.

Upon remand, the Department again imposed a 15-day suspension, its usual penalty for a first time sale-to-minor violation, stating:

While Rule 144 recognizes that a discipline-free licensing history may constitute mitigation of a violation, a mere three years and nine months does not constitute a sufficient period of discipline-free licensure to warrant mitigation under the facts of this case.

Appellants now contend that the Department abused its discretion in refusing to acknowledge mitigation.

DISCUSSION

Appellants contend (App.Br., page 4) that the Department "ignored the express

mandate of this Appeals Board” in imposing the same penalty.

The only express mandate of this Board directed the Department to reconsider the penalty in light of the correct period of discipline-free operation. The Board very carefully refrained from telling the Department what an appropriate penalty would be, or whether mitigation was appropriate in light of the correct period of discipline-free operation. Thus, the fact that the Department imposed the same penalty after reconsideration is not, by itself, evidence of an abuse of discretion.

The Department has wide discretion in determining appropriate discipline for licensee misconduct. (*Martin v. Alcoholic Bev. Control Appeals Bd.* (1959) 52 Cal.2d 287 [341 P.2d 296]. We cannot say that it has abused its discretion in this case. “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) 43 Cal.Rptr. 633 [400 P.2d 745].)

ORDER

The decision of the Department is affirmed.³

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³ This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.