

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

AB-8946

File: 20-291217 Reg: 08068278

7-ELEVEN, INC., and YOUNG S. SUH, dba 7-Eleven 2121-13649
5746 Amaya Drive, La Mesa, CA 91942,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: February 3, 2011
Los Angeles, CA

ISSUED APRIL 5, 2011

7-Eleven, Inc., and Young S. Suh, doing business as 7-Eleven 2121-13649 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for five days for their clerk selling an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Young S. Suh, appearing through their counsel, Ralph B. Saltsman and Soheyl Tahsildoost, and the Department of Alcoholic Beverage Control, appearing through its counsel, Valoree Wortham.

¹The decision of the Department, dated September 19, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on January 11, 1994. On March 25, 2008, the Department filed an accusation charging that appellants' clerk sold an alcoholic beverage to 18-year-old Desirae Vargas on June 23, 2007. Although not noted in the accusation, Vargas was working as a minor decoy for the Department at the time.

At the administrative hearing held on August 1, 2008, documentary evidence was received and testimony concerning the sale was presented by Vargas (the decoy) and by Department investigator Jeff Raybould. Co-appellant Young S. Negri² testified about employee training and procedures regarding sales of alcoholic beverages. Appellants submitted a brief and an offer of proof supporting the subpoena they had issued for the local District Administrator, Jennifer Hill. The ALJ quashed the subpoena on the Department's motion.

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

Appellants then filed an appeal contending: (1) The administrative law judge (ALJ) did not allow appellants to present evidence of the Department's use of a prohibited underground regulation in determining the penalty to be imposed, and (2) the penalty imposed is excessive.

DISCUSSION

I

Appellants subpoenaed the local Department District Administrator to testify and presented an offer of proof stating what they asserted would be her testimony. They

²Negri is the married name of co-appellant Suh.

contend that when the ALJ did not require the District Administrator to testify, he prevented them from presenting evidence of the Department's use of an illegal underground regulation in determining the penalty to be imposed.

The Board has addressed and rejected this argument before. (See, e.g., *Yummy Foods LLC* (2010) AB-8950; *Randhawa* (2010) AB-8973; *Chevron Stations, Inc.* (2010) AB-8974; *7-Eleven, Inc./ Wong* (2010) AB-8991; *7-Eleven, Inc./ Solanki* (2010) AB-9019.) Even if the District Administrator testified as the offer of proof said she would, that testimony would not establish that an underground regulation existed. We reject this argument as we have done before.

II

Appellants contend that the penalty imposed, a five-day suspension, is excessive because it does not reflect all the factors they presented in mitigation. They assert that an all-stayed penalty would be more appropriate.

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].)

Appellant's disagreement with the penalty imposed does not mean the Department abused its discretion. The penalty imposed was less than the 10-day suspension recommended by the Department at the hearing because of the mitigation evidence presented. Whether or not all the mitigating factors were given "proper" weight is not the concern of the Appeals Board; the Board's only concern is that the penalty imposed is not clearly unreasonable. It is not.

ORDER

The decision of the Department is affirmed.³

FRED ARMENDARIZ, CHAIRMAN
MICHAEL A. PROSIO, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This 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.