

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

AB-9410

File: 20-476099 Reg: 13078510

?-ELEVEN, INC., JIVTESH SINGH GILL, and PARAMJYOT SANDHU GILL,
dba 7-Eleven Store #2368-32262B
2360 West Grant Line Road, Tracy, CA 95377,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: October 2, 2014
Sacramento, CA

ISSUED OCTOBER 15, 2014

?-Eleven, Inc., Jivtesh Singh Gill and Paramjyot Sandhu Gill, doing business as ?-Eleven Store #2368-32262B (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for fifteen days, with five days conditionally stayed subject to one year of discipline-free operation, for their clerk selling an alcoholic beverage to a Department of Alcoholic Beverage Control minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Jivtesh Singh Gill, and Paramjyot Sandhu Gill, appearing through their counsel, R. Bruce Evans and Jennifer

¹The decision of the Department, dated January 31, 2014, is set forth in the appendix.

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L. Carr of the law firm of Solomon Saltsman & Jamieson, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kelly Vent.

FACTS AND PROCEDURAL HISTORY

Appellants' current off-sale beer and wine license was issued on April 27, 2009. Prior to that, appellants 7-Eleven, Inc. and Jivtesh Singh Gill held an off-sale beer and wine license at the present location as the franchisor and sole franchisee, respectively, since 1998. The current license was issued after Mr. Gill added his wife, appellant Paramjyot Sandhu Gill, as a co-franchisee. On May 10, 2013, the Department filed an accusation against appellants charging that, on April 22, 2013, appellants' clerk, Rabia Naeem Akhtar Gill, sold an alcoholic beverage to nineteen-year-old Emily Stevens. Although not noted in the accusation, Stevens was working as a decoy for the Department of Alcoholic Beverage Control (Department) at the time.

At the administrative hearing held on December 4, 2013, documentary evidence was received and testimony concerning the violation charged was presented by Stevens (the decoy). Appellant Jivtesh Singh Gill testified as a co-licensee on behalf of appellants.

The facts surrounding the decoy operation itself are not in dispute: appellants' clerk sold an alcoholic beverage to the minor decoy. Appellants, however, offered testimony regarding mitigation. Gill testified that he himself had been licensed at the premises since 1998. From 1998 to 2009, the year the current license was issued, there had been only one disciplinary action taken against the licensed location in 2004. However, from April 27, 2009 to April 22, 2013, there were no violations at the licensed premises. Gill also testified that appellants require all of their employees to take video training concerning the sale of alcoholic beverages entitled "Come of Age," and that

appellants employ a secret shopper program to ensure that their employees are checking for proof of majority from their customers who purchase alcoholic beverages. Finally, Gill testified that appellants do not provide their clerks with the option of "visual identification" at the register, and instead require them to either swipe the customer's identification card or enter the customer's date of birth in the register prior to selling an alcoholic beverage.

After the hearing, the Department's decision determined that the violation had been proven and that no defense had been established. The ALJ found that mitigation was warranted in light of appellants' disciplinary history and imposed a penalty of 15 days' suspension, with five days conditionally stayed.

Appellants have filed an appeal contending that the administrative law judge (ALJ) failed to properly consider their mitigating evidence, and that the Department abused its discretion in imposing the penalty.

DISCUSSION

Appellants contend that the Department abused its discretion in imposing the ALJ's proposed penalty because the ALJ failed to properly consider their evidence concerning mitigation.

The Board may examine the issue of excessive penalty if it is raised by an appellant, (*Joseph's of Cal. v. Alcoholic Bev. Control Appeals Bd.* (1971) 19 Cai.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 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 its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

The crux of appellants' argument is that ALJ "improperly ignores the *mandate* of Rule 144 and ignores the explicit mitigating factors contained therein upon which he can consider in ordering the penalty in this case." (App.Br. at p. 2, emphasis added.) To support this contention, appellants cite a previous decision of the Board where "similar mitigating facts" warranted the imposition of a more mitigated penalty. (*/d.* at pp. 6-7, citing *Fresh & Fine Foods* (2000) AB-7429.) Also, appellants claim that, because they produced evidence concerning multiple mitigating factors listed in rule 144, the ALJ's decision not to further mitigate the penalty was in conflict with the rule. (*/d.* at p. 7.)

Appellants' labeling of the language of rule 144 pertaining to mitigation as a "mandate" ignores both the spirit and the letter of the rule. First, the rule itself provides that "[d]eviation from [the Penalty Guidelines] is appropriate where the Department *in its sole discretion* determines that the facts of the particular case warrant such deviation – such as where facts in aggravation or mitigation exist." (Cal. Code Regs., tit. 4, § 144, emphasis added.)

Moreover, the Penalty Policy Guidelines further address the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

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.

The language of the guidelines establishes that the decision if and to what extent to mitigate a penalty is discretionary. The mitigating factors listed are not intended to impose a binding obligation to mitigate a penalty, regardless if one or even all of them are present in a particular case, and appellants have not cited any authority to the contrary.² Hence, absent clear evidence of abuse, this Board lacks the authority to interfere with the discretion exercised by either the ALJ or the Department in imposing the penalty.

In this case, the ALJ made the following findings regarding the measures appellants have in place to ensure that their employees are aware of, and complying with, the requirement to check for proof of majority among their customers:

Respondents require all of their employees to be trained by a video entitled "Come of Age" on the subject of sale of alcoholic beverages. Respondents also employ youthful-appearing "secret shoppers" to purchase alcoholic beverages to test whether Respondents' employees check for proof of majority. And, Respondents have deactivated the "visual option" for verification of a customer's majority, thereby requiring their clerks either to swipe an identification card or to punch in a customer's birthdate manually.

(Findings of Fact 'II VIII.)

²This notion is further supported by the fact that the list of mitigating factors in the Penalty Guidelines of rule 144 is prefaced by the language, "Mitigating factors *may include*, but are not limited to" (Emphasis added.)

Despite appellants' efforts, the ALJ found that further mitigation of the penalty was unwarranted:

Respondents requested mitigation of their penalty, noting the training which they provide their employees, their use of secret shoppers, and their deactivation of the "visual option" on their registers. This request is denied. The acts by Respondents to prevent the sale of alcoholic beverages to underage customers are acts that a prudent licensee would do as a matter of course and do not constitute cause for mitigation of Respondents' penalty.

(Determination of Issues IV.)

That the ALJ was unconvinced that appellants' efforts warranted further mitigation does not render the proposed penalty, or the Department's decision to adopt it, an abuse of discretion. As the trier of fact, the ALJ is afforded wide latitude to apply whatever weight he sees fit to appellants' evidence concerning mitigation.

Also, contrary to appellants' contention, the fact that lesser penalties have been upheld under similar circumstances in previous cases is irrelevant. That reasonable minds might differ with regard to the propriety of the penalty imposed serves to fortify the conclusion that the Department, as well as the ALJ in this case, acted within their discretion. (See *Harris, supra*, 62 Cal.2d at p. 594.)

As to reasonableness of the penalty, the Penalty Schedule of rule 144 recommends a default 15-day suspension for a first-time violation of Business and Professions Code section 25658. Thus, the suspension here is within the limits proposed by the rule.

Last, the ALJ and the Department agreed that some mitigation of the penalty was warranted on account of appellants' disciplinary record which, between the two licenses, was unblemished from 2004 to 2013. (Determination of Issues V.) For that reason, suspension of the license was conditionally stayed for five of the fifteen days.

That appellants would prefer a more mitigated penalty is inconsequential, and the Board finds no abuse of discretion by either the ALJ or the Department in this matter.

ORDER

The decision of the Department is affirmed.³

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