

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

AB-9649

File: 20-531206 Reg: 16084791

7-ELEVEN, INC., SSB and JK,
dba 7-Eleven Store #20803D
21701 Lake Forest Drive,
Lake Forest, CA 92630-2792,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: May 3, 2018
Los Angeles, CA

ISSUED MAY 30, 2018

Appearances: *Appellants:* Donna J. Hooper, of Solomon Saltsman & Jamieson, as counsel for 7-Eleven, Inc., SSB and JK, doing business as 7-Eleven Store #20803D.
Respondent: Jonathan Nguyen as counsel for the Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc., SSB and JK, doing business as 7-Eleven Store #20803D (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 15 days because their clerk sold an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

1. The decision of the Department, dated May 12, 2017, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on August 1, 2013. On August 26, 2016, the Department filed an accusation charging that appellants' clerk, Vijay Kumar Guntkal, sold an alcoholic beverage to 19-year-old Ismael Granados on June 26, 2016. Although not noted in the accusation, Granados was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on March 22, 2017, documentary evidence was received, and testimony concerning the sale was presented by Granados (the decoy) and by Agent Vic Duong of the Department of Alcoholic Beverage Control. Appellants presented no witnesses.

Testimony established that on the date of the operation, Agent Duong entered the licensed premises, followed shortly thereafter by the decoy. The decoy went to the alcoholic beverage cooler and selected a six-pack of Bud Light beer bottles. The decoy took the six-pack of beer to the front register area for purchase. He stood in line and waited while one male clerk attended to the patrons. In front of the decoy in line were three people who were together. No one stood behind the decoy. A second male clerk, later identified as Guntkal, opened a second register and motioned for the decoy to come to his register. The decoy walked to clerk Guntkal's register.

At the counter the decoy set the six-pack of Bud Light beer down on the counter. Clerk Guntkal scanned the beer. A yellow screen appeared on the register, which read, "ID 30 and under," "Must be 21 to purchase," "1. Picture on I.D. must match the customer," and "2. Scan or swipe I.D. or if birthdate is on or before 06-26-95 press

[manual enter]," with three button options along the bottom of the screen reading "Manual Enter," "Visual ID OK," and "Exit." Clerk Guntkal pressed the "Visual ID OK" button to override the system and permit the sale of alcohol. The decoy then gave Guntkal money to pay for the beer. Guntkal gave the decoy some change and bagged the beer. Guntkal did not ask for the decoy's identification, nor did he ask the decoy his age, date of birth, or any age-related questions. There was no conversation between the decoy and clerk Guntkal. The decoy then exited the store with the change and the bagged six-pack of Bud Light beer bottles. Agent Duong was inside the licensed premises during this entire time posing as a customer and witnessed these events.

Agent Duong and the decoy did not communicate with or acknowledge each other during this time. Agent Duong exited the store after the decoy.

Agent Duong re-entered the licensed premises with the decoy and Department Agent Sarah Hutson. Agent Duong first made contact with the other male clerk, advising him of the violation and asking him to relieve clerk Guntkal, who was behind a cash register. The other male clerk relieved Guntkal. At that point, Agent Duong identified himself as a police officer to Guntkal and explained the violation to him. Guntkal stepped from behind the employee side of the counter to the customer side.

Agent Duong asked the decoy to identify the person who sold him the beer. The decoy pointed at clerk Guntkal and said, "He did." The decoy and Guntkal were standing three feet apart and were facing each other at the time of this identification. Agent Duong then asked clerk Guntkal if he understood he was being identified as a person who sold alcohol to a minor. Guntkal replied, "Yes." A photo of Guntkal and the

decoy was taken after the face-to-face identification. In that photo, the decoy held the six-pack of Bud Light beer he purchased and stood to the right of clerk Guntkal.

After the hearing, the ALJ issued a proposed decision determining that the violation charged was proved and no defense was established.

On March 30, 2017, following submission of the proposed decision, the Department's Administrative Hearing Office sent a letter to appellants and to Department counsel offering both parties the opportunity to comment on the proposed decision. That letter stated:

Administrative Records Secretary and Concerned Parties:

Enclosed is the Proposed Decision resulting from the hearing before Department of Alcoholic Beverage Control, Administrative Hearing Office in the above entitled matter.

All concerned parties and their attorneys of record are being sent a copy of this Proposed Decision. All concerned parties and attorneys of record are hereby informed that you may submit comments regarding this Proposed Decision to the Director for consideration prior to any action being taken by the Director. Comments to the Director regarding this Proposed Decision shall be mailed to the Administrative Records Secretary. Additional comments submitted for review by the Director, if any, must also be submitted to all parties and their attorneys. For the convenience of all concerned, a list of those parties and their addresses is attached.

Pursuant to General Order 2016-02, the Administrative Records Secretary will hold this Proposed Decision until 14 days after the date of this letter. After that the Administrative Records Secretary will submit this Proposed Decision along with any comments received from concerned parties to the Director for consideration.

(Letter from John W. Lewis, Chief Admin. Law Judge, Dept. of Alcoholic Bev. Control, Mar. 30, 2017 [hereinafter "Comment Letter"].) As suggested in the final paragraph, the Comment Letter reflected a comment procedure adopted by the Department pursuant to its General Order 2016-02. (Dept. of Alcoholic Bev. Control, "GO-Ex Parte and Decision

Review," Gen. Order 2016-02, at § 3, ¶¶ 5-6 (eff. Mar. 1, 2016) [hereinafter "General Order"].)

On April 14, 2017, appellants submitted "Comments to the Director re Proposed Decision," which challenged the legality of the comment procedure itself. The Department submitted no comments.

Ultimately, the Department adopted the proposed decision without changes.

Appellants then filed this appeal contending the Department's comment procedure is an underground regulation, violates the Administrative Procedure Act, and encourages illegal ex parte communications.

DISCUSSION

This Board recently addressed an identical argument in *7-Eleven, Inc./Gupta* (2017) AB-9583. In that case, we concluded the Department's comment procedure, as outlined in the General Order, constitutes an unenforceable underground regulation. The comment procedure was identical in this case. We therefore reach the same legal conclusion here, and refer the parties to *Gupta* for our complete reasoning. (*Id.* at pp. 12-25.)

However, we also find that the sole comment, submitted by appellants, had no effect on the outcome of the case, and that the comment procedure did not materially affect appellants' due process rights. (See *id.* at pp. 26-29.) Appellants suffered no prejudice; we therefore offer no relief.

ORDER

The decision of the Department is affirmed.²

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
JUAN PEDRO GAFFNEY RIVERA, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

² 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.