

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

AB-9747

File: 20-458820 Reg: 18086561

7-ELEVEN, INC., HARJASJIT K. DHILLON, and SUKHMINDER S. DHILLON,
dba 7-Eleven Store #21834
108 West Washington Avenue,
El Cajon, CA 92020-5170,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: June 6, 2019
Ontario, CA

ISSUED JUNE 21, 2019

Appearances: *Appellants:* Donna J. Hooper, of Solomon, Saltsman & Jamieson,
as counsel for 7-Eleven, Inc., Harjasjit K. Dhillon, and Sukhminder
S. Dhillon,

Respondent: Alanna Ormiston, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

7-Eleven, Inc., Harjasjit K. Dhillon, and Sukhminder S. Dhillon, doing business as 7-Eleven Store #21834 (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 police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

¹The decision of the Department, dated September 11, 2018, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on February 1, 2008.

There is no prior record of disciplinary action against the license.

On February 26, 2018 the Department filed an accusation against appellants charging that, on November 6, 2017, appellants' clerk, Nada Kalyana Odeesh (the clerk), sold an alcoholic beverage to 18-year-old Joshua Roberto Browne (the decoy). Although not noted in the accusation, Browne was working as a minor decoy for the El Cajon Police Department (ECPD) at the time.

At the administrative hearing held on June 20, 2018, documentary evidence was received, and testimony concerning the sale was presented by the decoy and by Robert Lesagonicz, a police officer for the El Cajon Police Department (ECPD).

Testimony established that, on November 6, 2017, the decoy went to the licensed premises to purchase alcohol. After entering the premises, the decoy went to the beer coolers and selected a three-pack of 24 ounce Coors Light beer in cans. The decoy took the beer to the register and presented it to the clerk for purchase.

The clerk asked the decoy for identification and the decoy presented his California Driver's License, which was in portrait orientation (indicating he was under 21) and had his correct date of birth. Further, the decoy's driver's license had a red bar below his date of birth which said "AGE 21 IN 2020" in white letters. A blue colored box below the red bar, also with white letters, said "PROVISIONAL UNTIL AGE 18 IN 2017."

After the clerk appeared to look at the decoy's driver's license for approximately 5 seconds, she returned it to the decoy and rang up the beer. The decoy paid for the beer, was given change, and allowed to leave the store. The clerk never asked the

decoy's age or any age related questions.

Outside the store, the decoy went to a vehicle where law enforcement officers were waiting and told them what happened. The decoy and the officers then re-entered the store. While standing in the immediate area of the clerk, the decoy pointed at her and stated that she was the person who sold him the beer.

The clerk acknowledged making the sale to the decoy and told officers that she utilized the visual identification feature on the register. The clerk showed officers that, during an alcohol sale, a clerk could scan an identification card, manually enter a date of birth, or visually identify the person as being over 21 without a particular birth date being used.

The Department's decision determined that the violation charged was proved and no defense to the charge was established. The Department suspended appellant's license for 15 days. Appellants then filed an appeal contending that the Department abused its discretion in determining appellants' penalty under rule 144.²

²References to rule 144 and its subdivisions are to section 144 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

DISCUSSION

Appellants contend that the Department abused its discretion in applying factors of mitigation and aggravation to appellants' proposed penalty. (AOB, pp. 4-10.)

Specifically, appellants contend that the Department improperly: 1) minimized appellants' 10 year discipline-free history, and; 2) treated circumstances typical to any minor decoy operation as aggravating factors. (*Ibid.*)

The Board 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].) "Abuse of discretion" in the legal sense is defined as discretion exercised to an end or purpose not justified by and clearly against reason, all of the facts and circumstances being considered. [Citations.] (*Brown v. Gordon*, 240 Cal.App.2d 659, 666-667 (1966) [49 Cal.Rptr. 901].)

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 Board* (1965) 62 Cal. 2d 589, 594 [400 P.2d 745].)

Rule 144 provides:

In reaching a decision on a disciplinary action under the Alcoholic Beverage Control Act (Bus. and Prof. Code Sections 23000, et seq.), and the Administrative Procedures Act (Govt. Code Sections 11400, et seq.), the Department shall consider the disciplinary guidelines entitled "Penalty Guidelines" (dated 12/17/2003) which are hereby incorporated by reference. **Deviation from these guidelines is appropriate where the Department in its sole discretion determines that the facts of the particular case warrant such a deviation** - such as where facts in aggravation or mitigation exist.

(Cal. Code Regs., tit. 4, § 144, emphasis added.)

Among the mitigating factors provided by the rule are the length of licensure without prior discipline, positive actions taken by the licensee to correct the problem, cooperation by the licensee in the investigation, and documented training of the licensee and employees. Aggravating factors include, *inter alia*, prior disciplinary history, licensee involvement, lack of cooperation by the licensee in the investigation, and a continuing course or pattern of conduct. (*Ibid.*)

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.

(*Ibid.*)

Appellants argue that it was error for the Director to discount its length of discipline-free licensure — offered by appellants as evidence of mitigation — since other evidence at the hearing “suggest[ed] the lack of prior discipline . . . is more the product of luck than an ongoing effort by [appellants] to avoid underage sales.” (See Decision, at p. 6.) Appellants further object to the ALJ’s consideration of the fact that the clerk ignored clear evidence (the decoy’s appearance and identification) as

aggravating factors. (AOB, at pp. 8-9.)

As the Board has said many times over the years, the extent to which the Department considers mitigating or aggravating factors is a matter entirely within its discretion — pursuant to rule 144 — and the Board may not interfere with that discretion absent a clear showing of abuse. The record shows that the ALJ considered Appellants' arguments, but found that the "slight mitigation afforded by the lack of prior discipline ... is counterbalanced by the sale to an obviously underage person [and] actual evidence that the decoy was 18 years old." (Decision, at p. 6.) Appellants have not demonstrated that the ALJ (and by extension, the Department) abused his discretion in this case. The Board sees no error.

ORDER

The decision of the Department is affirmed.³

MEGAN McGUINNESS, ACTING CHAIR
SUSAN A. BONILLA, 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.*