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

AB-9864
File: 20-470710; Reg: 19088795

7-ELEVEN, INC. and PUNEET PAL SINGH BAINS,
dba 7-Eleven Store #12368 4110G
77 East Olive Avenue
Merced, CA 95340,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: David W. Sakamoto

Appeals Board Hearing: July 2, 2020
Telephonic

ISSUED JULY 6, 2020

Appearances: *Appellants:* Adam N. Koslin, of Solomon, Saltsman & Jamieson, as counsel for 7-Eleven, Inc. and Puneet Pal Singh Bains,

Respondent: Patrice G. Huber, as counsel for the Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and Puneet Pal Singh Bains, doing business as 7-Eleven Store #12368 4110G (appellants), appeal from a decision of the Department of Alcoholic Beverage Control (Department),[1] suspending their license for 10 days, with the execution of all 10 days conditionally stayed for a period of one year, provided no further cause for discipline arises during that time, because their clerk sold an alcoholic

[1] The decision of the Department under Government Code section 11517(c), dated January 30, 2020, is set forth in the appendix, as is the proposed decision of the administrative law judge (ALJ) dated August 21, 2019.

beverage to an individual under the age of 21, in violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on December 1, 2008. There is no record of prior departmental discipline against the license.

On May 8, 2019, the Department filed a single-count accusation against appellants charging that, on January 25, 2019, appellants' clerk, Elizabeth Silva Noia (the clerk), sold an alcoholic beverage to 18-year-old Reymundo Bucio Mendoza, an individual under 21 years of age (the minor).

On June 26, 2019, the Department issued a Notice of Hearing, scheduling an administrative hearing for August 7, 2019. On July 25, 2019, appellants filed a motion for continuance, requesting that co-licensee Puneet Bains be allowed testify at a later date about the premises' history, training, policy and procedures because he had a conflict with the annual 7-Eleven franchisee convention and would be unavailable to testify on August 7, 2019. The Department filed opposition to the motion on the basis of untimeliness and lack of good cause. Chief ALJ (CALJ) John Lewis denied appellants' motion on July 31, 2019, finding that good cause had not been shown for a continuance.

At the administrative hearing held on August 7, 2019, documentary evidence was received and testimony concerning the sale was presented by the minor and by Department Agent Joel Thalken. After presenting its case-in-chief, appellants renewed

their motion to continue the hearing and to bifurcate the trial to allow Mr. Bains to testify. ALJ Sakamoto denied appellants' request for a continuance.

The underlying facts of the accusation are not at issue in this appeal, but will be summarized briefly. Testimony established that on January 25, 2019, the minor was observed by Department agents at another licensed premises, speaking to a clerk at the register. They observed the clerk shaking his head as if to say "no" and since the minor looked young, they were concerned that he was attempting to purchase alcohol. They followed the minor, and observed as he entered appellants' licensed premises and successfully purchased a six-pack of Modelo beer. The clerk who sold him the beer did not ask for identification, nor did she ask any age-related questions prior to the sale. As the minor exited the licensed premises and was about to enter his vehicle, the agents detained him and identified themselves. They examined his California driver's license, determined that he was 18 years old, and issued him a citation for being a minor in possession of an alcoholic beverage.

Following the hearing, on August 21, 2019, the ALJ issued a proposed decision, sustaining the accusation and recommending a 10-day suspension, with the execution of all 10 days conditionally stayed for a period of one year. The Department initially declined to adopt the decision and notified the parties that it would decide the matter pursuant to Government Code section 11517(c)(2)(E). The parties were invited to submit written argument regarding an appropriate penalty, and factors in mitigation and aggravation. Both Department counsel and appellants submitted written arguments.

On January 30, 2020, the Department issued its Decision Under Government Code section 11517(c), adopting ALJ Sakamoto's proposed decision in its entirety.

Appellants then filed a timely appeal contending the decision should be reversed because they were wrongfully denied a continuance.

DISCUSSION

Appellants contend both the CALJ and the ALJ at the administrative hearing erred when they did not grant appellant's motion for a continuance. Specifically, appellants argue that it established good cause and that the denial of its motion prevented appellants from presenting additional mitigating evidence. (AOB at pp. 5-7.)

Continuances are granted or denied in the discretion of the ALJ for good cause shown. (Gov. Code, § 11524; *Givens v. Department of Alcoholic Beverage Control* (1959) 176 Cal.App.2d 529 [1 Cal.Rptr. 446]; *Dresser v. Board of Medical Quality Assurance* (1982) 130 Cal.App.3d 506, 518 [181 Cal.Rptr. 797].) The factors which influence the granting or denying of a continuance in any particular case are so varied that the trial judge must "necessarily exercise a broad discretion." (*Arnett v. Office of Admin. Hearings* (1996) 49 Cal.App.4th 332, 343 [56 Cal.Rptr.2d 774] (*Arnett*).) The "power to determine when a continuance should be granted is within the discretion of the court, and there is no right to a continuance as a matter of law." (*Mahoney v. Southland Mental Health Associates Medical Group* (1990) 223 Cal.App.3d 167, 170 [272 Cal.Rptr. 602].) The decision to grant or deny a continuance may implicate a broad range of potential considerations, but it necessarily requires "an affirmative showing of good cause" by the moving party. (Ca. St. Civil Rules, rule 3.1332(c).)

What constitutes "good cause" is the same for administrative hearings as it is for judicial proceedings. (see *Bussard v. Department of Motor Vehicles* (2008) 164 Cal.App.4th 858, 864 [79 Cal.Rptr.3d 414] ("[i]n exercising the power to grant or deny a

continuance, an administrative law judge is guided by the same principles applicable to continuances generally in adjudicative settings").) The California Rules of Court, while not binding on administrative hearings, offer guidance regarding the "good cause" requirement:

> **(c) Grounds for continuance**
>
> Although continuances of trials are disfavored, each request for a continuance must be considered on its own merits. The court may grant a continuance only on an affirmative showing of good cause requiring the continuance. Circumstances that may indicate good cause include:
>
> (1) The unavailability of an essential lay or expert witness because of death, illness, or other excusable circumstances;
>
> (2) The unavailability of a party because of death, illness, or other excusable circumstances;
>
> (3) The unavailability of trial counsel because of death, illness, or other excusable circumstances;
>
> (4) The substitution of trial counsel, but only where there is an affirmative showing that the substitution is required in the interests of justice;
>
> (5) The addition of a new party if:
>
> (A) The new party has not had a reasonable opportunity to conduct discovery and prepare for trial; or
>
> (B) The other parties have not had a reasonable opportunity to conduct discovery and prepare for trial in regard to the new party's involvement in the case;
>
> (6) A party's excused inability to obtain essential testimony, documents, or other material evidence despite diligent efforts; or
>
> (7) A significant, unanticipated change in the status of the case as a result of which the case is not ready for trial.

(d) Other factors to be considered

In ruling on a motion or application for continuance, the court must consider all the facts and circumstances that are relevant to the determination. These may include:

(1) The proximity of the trial date;

(2) Whether there was any previous continuance, extension of time, or delay of trial due to any party;

(3) The length of the continuance requested;

(4) The availability of alternative means to address the problem that gave rise to the motion or application for a continuance;

(5) The prejudice that parties or witnesses will suffer as a result of the continuance;

(6) If the case is entitled to a preferential trial setting, the reasons for that status and whether the need for a continuance outweighs the need to avoid delay;

(7) The court's calendar and the impact of granting a continuance on other pending trials;

(8) Whether trial counsel is engaged in another trial;

(9) Whether all parties have stipulated to a continuance;

(10) Whether the interests of justice are best served by a continuance, by the trial of the matter, or by imposing conditions on the continuance; and

(11) Any other fact or circumstance relevant to the fair determination of the motion or application.

(CA. St. Civil Rules, rule 3.1332(c) and (d).)

A belief that favorable evidence might be found does not automatically justify granting a continuance; the decision remains up to the ALJ's discretion. (*Wiler v.*

Firestone Tire & Rubber Co. (1979) 95 Cal.App.3d 621, 628 [157 Cal.Rptr. 248]; *Johnston v. Johnston* (1941) 48 Cal.App.2d 23, 26 [119 P.2d 158].)

An appellant has no absolute right to a continuance, and an ALJ's refusal to grant a continuance will not be disturbed on appeal unless it is shown to be an abuse of discretion. (*Cooper v. Board of Medical Examiners* (1975) 49 Cal.App.3d 931, 944 [123 Cal.Rptr. 563]; *Savoy Club v. Board of Supervisors* (1970) 12 Cal.App.3d 1034, 1038 [91 Cal.Rptr. 198].) The ALJ's decision "will be upheld unless a clear abuse is shown, amounting to a miscarriage of justice." (*Mahoney v. Southland Mental Health Associates Medical Group* (1990) 223 Cal.App.3d 167, 170 [272 Cal.Rptr. 602].)

Government Code section 11524 provides, in relevant part:

> (a) The agency may grant continuances. When an administrative law judge of the Office of Administrative Hearings has been assigned to the hearing, no continuance may be granted except by him or her or by the presiding judge of the appropriate regional office of the Office of Administrative Hearings, for good cause shown.
>
> (b) When seeking a continuance, a party shall apply for the continuance within 10 working days following the time the party discovered or reasonably should have discovered the event or occurrence which establishes the good cause for the continuance. A continuance may be granted for good cause after the 10 working days have lapsed if the party seeking the continuance is not responsible for and has made a good faith effort to prevent the condition or event establishing the good cause.

(Gov. Code § 11524(a)-(b).)

In the instant case, appellants' request was not timely. As Government Code section 11524(b) outlines, a party must request a continuance within 10 working days from the time they discovered, or reasonably should have discovered, the conflict.

Here, the Notice of Hearing was served on appellants on June 26, 2019. Appellants filed their motion to continue on July 22, 2019 — 18 working days later. (See RRB at p. 8.) In that motion, appellants state that Mr. Bains had "planned to attend the conference many months in advance." (Exh. 1, Motion to Continue, at p. 4.) Since appellants knew or should have known Mr. Bains had a conflict when they were served with the Notice of Hearing, a timely motion to continue this matter should have been filed by July 10, 2019.

In addition to being untimely, appellants failed to establish good cause for a continuance. As noted in Respondent's Reply Brief, the administrative hearing only conflicted with day three of the conference, and the legal discussions highlighted by appellants as being essential for Mr. Bains to attend took place on day four. (RRB at p. 9.) Furthermore, no evidence was presented to establish that Mr. Bains' attendance at the conference was mandatory, nor that he was the only person who could testify about the premises' history, training, policy and procedures. We agree with both CALJ Lewis and ALJ Sakamoto, that good cause was not shown for a continuance.

Even if it was error to deny a continuance, it does not warrant reversal. To justify reversal, an error must be prejudicial, and it must appear that a different result would have been probable if such error did not exist. (Code Civ. Proc., § 475; see *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 104 [87 Cal.Rptr.2d 754] (*Paterno*).) There is no presumption of injury from an error, and the burden is on the appellant to show that the error was sufficiently prejudicial to justify reversal. (*Kyne v. Eustice* (1963) 215 Cal.App.2d 627, 635-636 [30 Cal.Rptr 391]; see *Paterno*, at p. 106

(Appellant has the burden "of spelling out in his brief exactly how the error caused a miscarriage of justice").)

Here, appellants have failed to show that a different outcome would have been probable had the continuance been granted. They do not allege that the decision of the Department, concluding that appellants violated section 25658(a), resulted from the denial of a continuance. In fact, appellants concede that the violation took place. (AOB at p. 4.)

Nowhere in their briefs do appellants allege that granting the continuance would have altered the ALJ's conclusion that it violated section 25658(a). What appellants *do* allege is that denial of a continuance prevented it from introducing additional mitigating evidence. (AOB at pp. 5-7.) However, the problem is that testimony from Mr. Bains would factor into the penalty determination, not the ultimate decision. With respect to the penalty determination, rule 144 provides guidance for Department discipline and states, in relevant part:

> In reaching a decision on a disciplinary action under the Alcoholic Beverage Control Act [citation] and the Administrative Procedures Act [citation], 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.) The penalty guidelines further state:

> POLICY STATEMENT
>
> It is the policy of this Department to impose administrative, non-punitive penalties in a consistent and uniform manner with the goal of encouraging and reinforcing voluntary compliance with the law.

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.
>
> Higher or lower penalties from this schedule may be recommended based on the facts of individual cases where generally supported by aggravating or mitigating circumstances.

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

The plain language of these guidelines is permissive and leaves penalty determinations up to the Department's discretion. The guidelines list factors that *may* be considered in aggravation or mitigation. However, presenting mitigating evidence does not *entitle* an appellant to a mitigated penalty. Here, the Department weighed both aggravating and mitigating factors and issued a mitigated penalty. (Decision at pp. 8-9.) Even if Mr. Bains provided additional testimony, it would not have entitled appellants to a further mitigated penalty, much less altered the ultimate outcome.

In closing, there is no absolute right to a continuance. The ALJ has significant discretion in weighing the present facts and circumstances in deciding whether to grant a continuance. Here, appellants filed an untimely motion for continuance, and failed to

establish good cause in both its written and renewed motion for a continuance. Appellants also failed to show that, but for the ALJ's denial of a continuance, a different outcome would have been probable. Under all the circumstances, we conclude that no reversible error took place and must affirm the ALJ's denial of a continuance and the Department's ultimate decision.

ORDER

The decision of the Department is affirmed.[2]

SUSAN A. BONILLA, CHAIR
MEGAN McGUINNESS, 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.

APPENDIX

BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE ACCUSATION AGAINST:

7-ELEVEN, INC.
AND PUNEET PAL SINGH BAINS
7-ELEVEN STORE 2368 14110G
77 E. OLIVE AVENUE
MERCED, CA 95340

OFF-SALE BEER AND WINE - LICENSE

Respondent(s)/Licensee(s)
Under the Alcoholic Beverage Control Act

STOCKTON DISTRICT OFFICE

File: 20-470710

Reg: 19088795

CERTIFICATE OF DECISION

NOTICE CONCERNING PROPOSED DECISION

To the parties in the above-entitled proceedings:

You are hereby advised that the Department considered, but did not adopt, the Proposed Decision in the above titled matter and that the Department will itself decide the case pursuant to the provisions of Section 11517(c)(2)(E). A copy of the Proposed Decision has previously been sent to all parties.

The Department has requested that a transcript of the hearing be prepared. A copy of the record will be made available to you. Upon receipt of the hearing transcript, the Department will notify you of the cost of a copy of the record. At that time you all also be advised of the date by which written argument if any, is to be submitted.

Sacramento, California

Dated: October 29, 2019

Matthew D. Botting
General Counsel

RECEIVED
OCT 30 2019
Alcoholic Beverage Control
Office of Legal Services

BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE ACCUSATION AGAINST:

7-Eleven, Inc. and Puneet Pal Singh Bains Dba: 7-Eleven Store 2368 14110G 77 E. Olive Avenue Merced, CA 95340	}	File: 20-470710 Reg.: 19088795 License Type: 20
Respondents	}	Word Count Estimate: 10,000
Regarding Their Type-20 Off-Sale Beer and Wine License Issued Under the State Constitution and the Alcoholic Beverage Control Act.	}	Rptr: Greta Gregory, CSR-8612 (Atkinson-Baker Reporters) **PROPOSED DECISION**

Administrative Law Judge David W. Sakamoto, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter in Merced, California, on August 7, 2019.

Colleen Villarreal, Attorney III, Office of Legal Services, Department of Alcoholic Beverage Control, represented the Department of Alcoholic Beverage Control. (Hereafter the Department)

Brian Washburn, Esq., of Solomon, Saltsman, and Jamieson, represented 7-Eleven, Inc. and Puneet Pal Singh Bains. (Collectively hereafter Respondent)

On July 31, 2019, Presiding Administrative Law Judge Lewis (Hereafter ALJ Lewis) issued an order denying Respondent's motion to continue the hearing scheduled for August 7, 2019. Respondent requested the hearing be continued because co-licensee Bains wanted to attend the annual 7-Eleven franchise holders convention that conflicted with the August 7, 2019 hearing date. The motion to continue, opposition thereto, and order thereon are part of Exhibit 1 (Pre-hearing pleadings) in this case.

On August 7, 2019, the hearing was convened and commenced. After the Department presented its case-in-chief, Respondent renewed its motion to continue or bifurcate the hearing. Respondent re-asserted the same basic ground for its motion that it presented to ALJ Lewis in its earlier motion, i.e. co-Licensee Bains wanted to attend the annual out-of-town 7-Eleven franchisees convention. Respondent also contended it did not get a chance to submit a rebuttal to the Department's written opposition to its original written motion to continue the hearing heard by ALJ Lewis. As the primary reason Respondent re-raised its motion to continue the hearing on August 7, 2019 was the same as was already denied by ALJ Lewis, there was no reason to over-ride or reverse his earlier order denying the continuance. As to the inability to have had the opportunity to file a rebuttal to the Department's written opposition, that should have been addressed directly to ALJ Lewis. Waiting until after the Department had already presented its case-in-chief to raise that procedural issue was too late. The undersigned ALJ denied Respondent's renewed request to continue or bifurcate the hearing. The hearing continued on the merits.

After oral evidence, documentary evidence, evidence by oral stipulation on the record, and Respondent's renewed motion to continue the hearing was all heard at the hearing, the matter was argued by the parties and submitted for decision on August 7, 2019.

The Department's accusation alleged cause for suspension or revocation of Respondent's license exists under California State Constitution, Article XX, section 22, and Business and Professions Code section 24200, subdivision (a) and (b), based on the following ground:[1]

Count 1 : "On or about January 25, 2019, respondent-licensee's agent or employee, Elizabeth Silva Noia, at said premises, sold, furnished, gave or caused to be sold, furnished, or given, an alcoholic beverage, to-wit: beer, to Raymundo Bucio Mendoza, a person under the age of 21 years, in violation of Business and Professions Code Section 25658(a)." (Exhibit 1: Pre-hearing pleadings)

FINDINGS OF FACT

1. The Department filed its accusation on May 8, 2019. On May 28, 2019, the Department received Respondent's Notice of Defense and Special Notice of Defense alleging certain defenses and requesting a hearing on the accusation. The Department set the matter for a hearing. (Exhibit 1: Pre-hearing pleadings.)

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[1] All further section references are to the California Business and Professions Code unless noted otherwise.

2. On December 1, 2008, the Department issued Respondent a type-20 off-sale beer and wine license for its premises as captioned above.[2] (Hereafter the Licensed Premises)

3. Respondent suffered no disciplinary action since being licensed.

4. On January 25, 2019, Raymundo Bucio Mendoza (hereafter Raymundo) was 18 years old, being born on June 12, 2000.[3] At approximately 8:00 p.m. to 9:00 p.m. that day, he entered the Licensed Premises and asked sales clerk Elizabeth Silva Noia (Hereafter Elizabeth) if the store carried a product known as a "Michelada Cup".[4] Elizabeth indicated the store did not carry that product, so Raymundo left.

5. Raymundo and his friend, "Enrique", drove to a nearby liquor store, known as Village Liquor.[5] He and Enrique went inside that store but were informed it did not carry "Michelada Cups" either. At that same time, Alcoholic Beverage Control Agent Thalken and his partners were in the area on routine enforcement duties. They saw Raymundo and Enrique in Village Liquor and, as they looked youthful and suspected they might try to purchase alcoholic beverages, focused on their activities.

6. Agent Thalken saw Raymundo and Enrique exit Village Liquor without any alcoholic beverages. Raymundo and Enrique drove back to the Licensed Premises followed by Agent Thalken and his partners in their own car.

7. Once at the Licensed Premises, Raymundo entered the Licensed Premises while Enrique waited in his car. Once inside, Raymundo selected a six-pack of Modelo beer from the refrigerated section and took it to the sales counter. Agent Thalken and his partners then arrived at the Licensed Premises and, through the Licensed Premises window, saw Raymundo in a check-out line carrying his Modelo beer.

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[2] A type-20 license permits the license-holder to retail in beer and wine for consumption off the licensed premises.

[3] Raymundo Bucio-Mendoza testified at the hearing regarding his actions on January 25, 2019. He was not a police-decoy as described in section 25658, subdivision (f).

[4] A "Michelada Cup" is a cup that contains dry ingredients and seasonings. It is not itself a beverage. The user pours his/her beer into the cup to mix with the pre-packaged seasonings, resulting in a flavored beer.

[5] Raymundo testified he thought Enrique was 18-19 years old.

8. Elizabeth sold Raymundo the six-pack of Modelo beer. Elizabeth did not ask Raymundo his age or ask to view his identification as part of selling him the beer. Raymundo exited the Licensed Premises and was just about to enter his car when he was detained by Agent Thalken and his partners. The agents identified themselves to Raymundo, seized his beer, and inspected his valid California Driver License. (Hereafter CDL) They also took a photo of him and his beer. (Exhibit 2A: Photo of Raymundo and Exhibit 2B:Photo of Modelo beer)

9. Raymundo told Agent Thalken the clerk did not ask his age or to view his identification. Raymundo told the agents he never possessed any form of a false identification. Agent Thalken searched Raymundo's wallet and did not find any false identification, only a high-school identification card.[6] Agent Thalken had Raymundo complete a written questionnaire/statement about what he did at the store that night.[7] Raymundo was also issued a citation for violating section 25658, subdivision (b), because he was a minor in possession of an alcoholic beverage.

10. Raymundo had been to the Licensed Premises on two prior occasions, but neither purchased an alcoholic beverage there nor was in the presence of anyone who did. Raymundo testified he never possessed any sort of false identification. Raymundo has a twin brother who had never purchased an alcoholic beverage at the Licensed Premises either.

11. Agent Thalken interviewed Elizabeth. He told her she sold an alcoholic beverage to a minor. She told him Raymundo had, in the past, showed her an identification at the Licensed Premises that indicated Raymundo was at least 21 years old.

LEGAL BASIS OF DECISION

1. Article XX, section 22, of the California Constitution and Business and Professions Code section 24200, subdivision (a), provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.

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[6]In Agent Thalken's experience, minors usually kept any false identification they had in their wallet. Therefore, he did not otherwise search Raymundo, Enrique, or their car.

[7] Neither party provided Raymundo's written statement as an exhibit at the hearing.

2. Business and Professions Code section 24200, subdivision (b), provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.

3. Business and Professions Code section 25658, subdivision (a), provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.

4. Business and Professions Code section 25660 generally provides a defense to a licensee or person accused of selling an alcoholic beverage to a minor if the person asked for and reasonably relied on bona-fide evidence of majority and identity provided by the minor-customer.

DETERMINATION OF ISSUES

1. Cause for suspension or revocation of Respondent's license exists under Article XX, section 22, of the California State Constitution and Business and Professions Code section 24200, subdivision (a), because on January 25, 2019, Respondent's agent or employee, Elizabeth Silva Noia, inside the Licensed Premises, sold an alcoholic beverage to Raymundo Bucio Mendoza, a person under the age of 21, in violation of Business and Professions Code section 25658, subdivision (a).

2. The evidence established that on January 25, 2019, Respondent's agent or employee, sales-clerk Elizabeth Silva Noia, sold an alcoholic beverage, in the form of a six-pack of Modelo beer, to Raymundo Bucio Mendoza, who was then 18 years old. She did not ask Raymundo his age or to view his identification at the time of the sale. To that extent, there was sufficient evidence to sustain Count 1, a violation of section 25658, subdivision (a). (Findings of Fact ¶¶ 4-8)

3. Respondent argued the accusation was not proven on several grounds. Respondent argued Raymundo was not a credible witness due to conflicts in his testimony compared to what he wrote in an affidavit he completed at the scene. Firstly, neither party submitted as evidence whatever affidavit/written statement Agent Thalken obtained from Raymundo that night. Raymundo was not shown the affidavit at the hearing so as to provide him with any opportunity to explain whatever discrepancies there might have been between his testimony and what was in the affidavit. However, despite whatever discrepancies existed, Raymundo appeared a credible witness and his testimony about purchasing the six pack of beer at the Licensed Premises was wholly consistent with Agent Thalken's observations of Raymundo's actions. Respondent presented no evidence to the contrary. The evidence was certain that on January 25, 2019, Raymundo purchased beer at the Licensed Premises.

4. Respondent argued Agent Thalken neither searched Enquire nor Enrique's car for any false identification Raymundo may have used. Agent Thalken indicated he searched Raymundo's wallet for any false identification and found only a high school identification card. Agent Thalken's experience was that minors usually kept false identifications in their wallet. Also, if Raymundo possessed a false identification that night, why would it be in Enrique's car or with Enrique, who remained in the car? It would serve no purpose being there if the clerk wanted Raymundo to present it as proof of age. Further, the Agents stopped Raymundo just prior to him getting to the car, so if Raymundo had a false identification, he would likely still have it when searched by Agent Thalken.

5. Section 25660 provides a defense to a licensee or person accused of selling an alcoholic beverage to a minor if the person asked for and reasonably relied on bona-fide evidence of majority and identity provided by the minor-purchaser. To the extent Respondent was attempting to rely on section 25660 as a defense to the accusation based on Elizabeth's hearsay statement that Raymundo had, in the past, displayed an identification to her indicating he was at least 21 years old, such defense had no merit in this case.

6. Government Code section 11513, subdivision (d), states: "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration." Respondent made a hearsay objection to Thalken's recitation of Elizabeth's statement regarding Raymundo's prior showing of an identification to her. No exception to the hearsay rule was proffered allowing the statement to be used as direct evidence. However, a hearsay statement could be used to supplement or explain other evidence. In this instance, her statement about Raymundo's prior showing of an identification did not support or explain any other evidence regarding his usage of any identification. In fact, Raymundo testified he neither possessed a false identification nor ever used/displayed one at the Licensed Premises. Elizabeth's hearsay statement was insufficient proof Raymundo ever showed her any false identification on any earlier occasion at the Licensed Premises.

7. However, even if it were assumed her statement might support a defense to the accusation under section 25660, the defense was not established.

8. Section 25660 is an affirmative defense, so a licensee has the burden of establishing all of its elements, namely, that evidence of majority and identity was demanded by the seller, shown by the buyer, and reasonably relied on by the seller.[8] To provide a defense, reliance on the document must be reasonable, that is, it was based on due diligence of the seller. This section applies to identifications actually issued by government agencies and identifications that are false replicas of government identifications.[9]

9. A licensee or his or her employee is not entitled to rely upon an identification if it does not appear to be a bona fide government-issued identification or replica thereof or if the appearance of the presenter of the identification demonstrates above mere suspicion that the holder is not the legal owner of the identification.[10] The defense is also inapplicable if the appearance of the presenter does not match the description on the identification.[11] Thus, reasonable reliance cannot be established unless the appearance of the person presenting identification indicates that he or he could be 21 years of age and the seller makes a reasonable inspection of the false identification.

10. In this instance, Elizabeth was not called as a witness to testify about what occurred on January 25, 2019 and what, if anything, occurred during any prior sales transaction she had with Raymundo, including any meaningful details about the form, content, type, style, appearance, condition, or composition of any identification she claimed Raymundo ever showed her and the reasonableness of her inspection thereof. There was no way to determine if any reliance she may have placed on any purported identification Raymundo may have shown her was reasonable. As such, Respondent did not fulfill meeting the elements of establishing an affirmative defense to the accusation under section 25660.

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[8] *Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control*, 261 Cal. App. 2d 181, 189, 67 Cal. Rptr. 734, 739 (1968); 27 Ops. Atty. Gen. 233, 236 (1956).

[9] *Dept. of Alcoholic Beverage Control v. Alcoholic Control Appeals Bd. (Masani)*, 118 Cal. App. 4th 1429, 1444-45, 13 Cal. Rptr. 3d 826, 837-38 (2004).

[10] *Masani*, 118 Cal. App. 4th at 1445-46, 13 Cal. Rptr. 3d at 838; *5501 Hollywood, Inc. v. Department of Alcoholic Beverage Control*, 155 Cal. App. 2d 748, 753, 318 P.2d 820, 823-24 (1957); *Keane v. Reilly*, 130 Cal. App. 2d 407, 411-12, 279 P.2d 152, 155 (1955); *Conti v. State Board of Equalization*, 113 Cal. App. 2d 465, 466-67, 248 P.2d 31, 32 (1952).

[11] *5501 Hollywood*, 155 Cal. App. 2d at 751-54, 318 P.2d at 822-24; *Keane*, 130 Cal. App. 2d at 411-12, 279 P.2d at 155.

11. Respondent argued Raymundo looked older because at the hearing he was wearing an expensive/exclusive "Burberry" brand shirt and possibly a "Burberry" belt. Even so, it was not established he was wearing such articles of clothing on January 25, 2019 at Respondent's store or on any other occasion he was there. Even if he were wearing such clothing, that did not necessarily result in him looking any older than his actual age, 19. As Elizabeth did not testify, there was no evidence what Raymundo wore at the Licensed Premises or who manufactured those clothes played any role in her decision to sell him the six-pack of Modelo beer.

12. Respondent pointed out that on January 25, 2019, Raymundo was about six months away from turning 19 years old. While that was true, that was not shown to be of any material consequence or to have played any role in Elizabeth selling beer to Raymundo that day.

13. Except as set forth in this decision, all other allegations in the accusation and all other contentions made by the parties in the pleadings or at the hearing regarding those allegations lack merit.

PENALTY

1. In assessing an appropriate measure of discipline, the Department's penalty guidelines are in California Code of Regulations, title 4, section 144. (Hereafter rule 144) Under rule 144, the presumptive penalty for a first violation for selling or furnishing an alcoholic beverage to a minor in violation of section 25658 is a 15-day license suspension.

2. Rule 144 also permits imposition of a revised penalty based on the presence of aggravating or mitigating factors. Rule 144 contains a non-exhaustive list of those factors. One of the aggravating factors listed is the "Appearance and actual age of minor". One of the mitigating factors listed is "Length of licensure at subject premises without prior discipline or problems."

3. The Department recommended a 15-day license suspension. It contended that while the Respondent had been licensed since 2008 with no prior disciplinary action, this case involved the sale of beer to a youthful appearing 18-year old who was neither asked his age nor to present identification at the time of the sale. Therefore, any mitigation warranted by the term of discipline-free licensure was fully off-set resulting in the Department's 15-day license suspension recommendation.

4. Respondent contended a 5-day suspension, with all 5 days stayed/suspended was appropriate. It asserted it was licensed just over 10 years with no prior disciplinary action. It contended such resulted from its successful training program. However, Respondent did not present any evidence of what training it gave to its employees, either before or after the violation herein, to reduce, suppress, or avoid selling alcoholic beverages to minors.

5. In assessing the measure of discipline, rule 144 does note the "Appearance and actual age of minor" as a factor in aggravation. In this matter, while Raymundo was 18 and did appear youthful, he did not appear so youthful as to be considered a factor in aggravation.

6. Rule 144 also recognizes the length discipline-free licensure as a factor in mitigation. In this instance, the Licensed Premises operated just over 10 years with no disciplinary action. Over 10 years operation without discipline warrants a net downward departure from the 15-day suspension specified in rule 144. Rule 144 does not require a showing the discipline-free term of licensure worthy of mitigation was the result of any particular cause or circumstance as a condition of receiving mitigative effect on a penalty.

7. The order below reflects a weighing of the aggravating and mitigating circumstances shown in this matter and complies with rule 144's considerations.

8. Except as set forth in this decision, all other arguments, contentions, and assertions raised by the parties with respect to the appropriate penalty were without merit.

ORDER

1. Count 1 of the accusation is sustained.

2. Respondent's license is suspended for a period of 10 days, with all 10 days of suspension stayed for a period of 12 months commencing the date the decision in this matter becomes final, upon the condition that no subsequent final determination is made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred during the period of the stay. Should such a determination be made, the Director of the Department of Alcoholic Beverage Control may, in the Director's sole discretion and without further hearing, vacate the stay and impose the 10 stayed-days of suspension, and should no such determination be made, the stay shall become permanent.

Dated: August 21, 2019

David W. Sakamoto
Administrative Law Judge

☐ Adopt

☒ Non-Adopt: _____

_____

By: _____

Date: 10/29/19

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

7-ELEVEN, INC. and PUNEET PAL SINGH BAINS, dba 7-Eleven Store #14110G 77 East Olive Avenue Merced, CA 95340, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	AB-9864 File: 20-470710 Reg: 19088795 **DECLARATION OF SERVICE BY MAIL**

I, MARIA SEVILLA, declare that I am over the age of eighteen (18) years, and not a party to the within action; that my place of employment and business is 1325 J Street, Suite 1560, Sacramento, CA; that on the 6th day of July, 2020, I served a true copy of the attached **Decision** of the Alcoholic Beverage Control Appeals Board in the above-entitled proceeding on each of the persons named below:

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent to the person(s) at the e-mail address(es) listed below:

Ralph Barat Saltsman Solomon, Saltsman & Jamieson 426 Culver Boulevard Playa Del Rey, CA 90203 rsaltsman@ssjlaw.com	Department of ABC Office of Legal Services 3927 Lennane Drive, Suite 100 Sacramento, CA 95834 yuri.jafarinejad@abc.ca.gov

I declare under penalty of perjury that the foregoing is true and correct. Executed at Sacramento, California, on the 6th day of July, 2020.

Maria Sevilla

MARIA SEVILLA