

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

AB-9867

File: 20-557582; Reg: 19088880

7-ELEVEN, INC. and MALTI J. KASONDRA,
dba 7-Eleven Store #36770A
8254 White Oak Avenue, Suite 5
Northridge, CA 91325,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: September 10, 2020
Telephonic

ISSUED SEPTEMBER 14, 2020

Appearances: *Appellants:* Adam N. Koslin, of Solomon, Saltsman & Jamieson, as
counsel for 7-Eleven, Inc. and Malti J. Kasondra,

Respondent: Lisa Wong, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and Malti J. Kasondra, doing business as 7-Eleven Store #36770A (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 Code² section 25658(a).

¹ The decision of the Department, dated February 20, 2020, is set forth in the appendix.

² All statutory references are to the Business and Professions Code unless otherwise stated.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on August 21, 2015.

There is no record of prior departmental discipline against the license.

On May 30, 2019, the Department filed a single-count accusation against appellants charging that, on February 14, 2019, appellants' clerk, Ricardo Martinez (the clerk), sold an alcoholic beverage to 18-year-old Alexia Hannah Green (the decoy). Although not noted in the accusation, the decoy was working for the Los Angeles Police Department (LAPD) at the time.

At the administrative hearing held on November 19, 2019, documentary evidence was received, and testimony concerning the sale was presented by the decoy and LAPD Officer Manuel Vargas. Co-licensee Malti Kasondra testified on appellants' behalf.

Evidence established that Officer Vargas entered the licensed premises followed shortly thereafter by the decoy. The decoy went to the coolers and selected a six-pack of Bud Light beer. She took the beer to the counter and set it down. The clerk asked to see the decoy's ID. The decoy handed the clerk her valid California driver's license (exh. 2), showing her to be 18 years old. After looking at the ID for a few seconds, the clerk handed the ID back to the decoy and completed the sale.

The decoy exited the licensed premises and met with a supervising officer outside. She re-entered the store with the supervising officer and went to the counter area. The supervising officer asked the decoy to identify the person who sold her the beer and she identified the clerk. A photograph of the clerk and the decoy were taken together. (Exh. 4.)

On December 17, 2019, the administrative law judge (ALJ) issued a proposed decision sustaining the accusation and recommended a 15-day suspension. The Department adopted the proposed decision in its entirety on February 5, 2020 and issued a certificate of decision on February 20, 2020. Appellants filed a timely appeal contending that the imposed 15-day penalty is excessive.

DISCUSSION

Appellants argue that the 15-day suspension is excessive. (AOB, at pp. 7-9.) Specifically, appellants contend that the Department “disregarded all of the mitigating evidence presented by Appellants where no aggravating evidence whatsoever was present.” (*Id.* at p. 7.) In essence, appellants believe they should have received a shorter suspension. (*Id.* at pp. 7-9.)

This 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 Cal.App.3d 785, 789 [97 Cal.Rptr. 183].) However, 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].) An administrative agency abuses its discretion when it “exceeds the bounds of reason.” (*County of Santa Cruz v. Civil Service Commission of Santa Cruz* (2009) 171 Cal.App.4th 1577, 1582 [90 Cal.Rptr.3d 394, 397].) However, “[i]f 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].)

In determining disciplinary action, the Department is required to consider the penalty guidelines incorporated in California Code of Regulations, title 4, section 144.

The standard penalty for a first-time violation of section 25658(a) is 15 days, which is exactly the penalty appellant received here. (Cal. Code Regs., tit. 4, § 144.)

Nevertheless, rule 144 allows the Department to deviate from the standard penalty when, “*in its sole discretion*[, it] determines that the facts of the particular case warrant such deviation — such as where facts in aggravation or mitigation exist.” (*Ibid.*, emphasis added.)

Factors in aggravation include prior disciplinary history, prior warning letters, licensee involvement, premises located in high crime area, lack of cooperation by licensee in investigation, appearance and actual age of minor, and continuing course or pattern of conduct. (Cal. Code Regs., tit. 4, § 144.) Factors in mitigation include the length of licensure at subject premises without prior discipline or problems, positive action by licensee to correct problem, documented training of licensee and employees, and cooperation by licensee in investigation. However, neither list of factors is exhaustive; the Department may use its discretion to determine whether other aggravating or mitigating circumstances exist. (*Ibid.*)

Here, appellants believe they should have been afforded a mitigated penalty based on their “documented training, surveillance, and subsequent passage of a tobacco decoy sting operation at the [licensed premises].” (AOB, at p. 7.) Appellants argue this evidence was wrongfully disregarded by the Department. (*Ibid.*) In its decision, the Department wrote that its basis for not mitigating the standard 15-day penalty was due to appellants’ “relatively short licensed history (3 ½ years) and the fact that the clerk had failed to follow procedure when tested by a secret shopper prior to this incident” (Decision, at p. 4.) Based on the above, the Board cannot say that the Department abused its discretion.

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. Rule 144 provides a standard 15-day suspension for a section 25658(a) violation, which is what appellants received. Rule 144 also allows the Department to exercise discretion to consider aggravation and mitigation. The Department's rejection of appellant's mitigation evidence, because of its short license history and a prior failure to check ID by the clerk, was reasonable and not an abuse of discretion. Therefore, the penalty must stand.

ORDER

The decision of the Department is affirmed.³

SUSAN A. BONILLA, CHAIR
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³ 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.

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 APPEAL BY:

7-ELEVEN, INC., MALTI J. KASONDRA
DBA: 7-ELEVEN STORE 36770A
8254 WHITE OAK AVE., STE. 5
NORTHRIDGE, CA 91325-4367

OFF-SALE BEER AND WINE - LICENSE

VAN NUYS DISTRICT OFFICE

File: 20-557582

Reg: 19088880

AB: 9867

Respondent(s)/Licensee(s)
under the Alcoholic Beverage Control Act.

CERTIFICATION

I, Yuri Jafarinejad, do hereby certify that I am a Senior Legal Analyst for the Department of Alcoholic Beverage Control of the State of California.

I do hereby further certify that annexed hereto is a true, correct and complete record (not including the Hearing Reporter's transcript) of the proceedings held under Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code concerning the petition, protest, or discipline of the above-listed license heretofore issued or applied for under the provisions of Division 9 of the Business and Professions Code.

IN WITNESS WHEREOF, I hereunto affix my signature on June 2, 2020, in the City of Sacramento, County of Sacramento, State of California.



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. & MALTI J. KASONDRA
7-ELEVEN #36770A
8254 WHITE OAK AVE., STE 5
NORTHRIDGE, CA 91325-4367

OFF-SALE BEER AND WINE - LICENSE

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

VAN NUYS DISTRICT OFFICE

File: 20-557582

Reg: 19088880

CERTIFICATE OF DECISION

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on February 5, 2020. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814.

On or after April 1, 2020, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: February 20, 2020



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

7-Eleven Inc. & Malti J. Kasondra	}	File: 20-557582
dba 7-Eleven #36770A	}	
8254 White Oak Ave., Suite 5	}	Reg.: 19088880
Northridge, California 91325-4367	}	
	}	License Type: 20
Respondents	}	
	}	Word Count: 15,500
	}	
	}	Reporter:
	}	Sauvana Winn
	}	Kennedy Court Reporters
	}	
<u>Off-Sale Beer and Wine License</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Van Nuys, California, on November 19, 2019.

Lisa Wong, Attorney, represented the Department of Alcoholic Beverage Control.

Adam N. Koslin, attorney-at-law, represented respondents 7-Eleven Inc. and Malti J. Kasondra. Malti Kasondra was present.

The Department seeks to discipline the Respondents' license on the grounds that, on or about February 14, 2019, the Respondents, through their agent or employee, sold, furnished, or gave alcoholic beverages to Alexia Hannah Green, an individual under the age of 21, in violation of Business and Professions Code section 25658(a).¹ (Exhibit 1.)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on November 19, 2019.

FINDINGS OF FACT

1. The Department filed the accusation on May 30, 2019.

¹ All statutory references are to the Business and Professions Code unless otherwise noted.

2. The Department issued a type 20, off-sale beer and wine license to the Respondents for the above-described location on August 21, 2015 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondents' license.
4. Hannah Green was born on February 6, 2001. On February 14, 2019, she served as a minor decoy during an operation conducted by the Los Angeles Police Department. On that date she was 18 years old.
5. Green appeared and testified at the hearing. On February 14, 2019, she wore jeans and a sweatshirt. Her hair was long and tied back in a ponytail. She wore a watch which was not visible since it was covered by the sleeves of her sweatshirt. (Exhibits 3-4.) At the hearing her appearance was the same.
6. On February 14, 2019, Ofcr. M. Vargas entered the Licensed Premises. Green entered a few moments later. She went to the coolers and looked for a single can of beer. Not finding one, she selected a 6-pack of Bud Light beer.
7. Green took the beer to the counter and set it down. The clerk, Ricardo Martinez, asked to see her ID. She handed him her California driver license. (Exhibit 2.) Martinez looked at the ID for a few seconds, then handed it back to her. Green paid and exited with the beer.
8. Outside, Green met up with the officer who was supervising the operation. She re-entered with him and went to the counter area. The supervising officer asked her to identify the person who sold her the beer. She pointed to Martinez and said that he had. Green and Martinez were five to six feet apart at the time. A photo of the two of them was taken. (Exhibit 4.) Ofcr. Vargas, who was not present at the time, believed that Martinez was cited after the face-to-face identification pursuant to LAPD's standard procedure.
9. Green learned of the decoy program from her father, who works for LAPD. February 14, 2019 was the only time she worked as a decoy. On that date she visited approximately six locations. She was more confident at the Licensed Premises than she had been at the earlier locations she visited that night, but was still a little nervous and may have been trembling.
10. Green appeared her age, 18 years old, at the time of the decoy operation. Based on her overall appearance, i.e., her physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in the Licensed Premises on February 14, 2019, Green displayed the appearance which could generally

be expected of a person under 21 years of age under the actual circumstances presented to Martinez.

11. Co-licensee Malti Kasondra testified that this is the third 7-Eleven store where she has been the franchisee. She still owns one of the other ones, in Simi Valley, but sold her Northridge store. She has no disciplinary history at any of the three locations. (Exhibit D.) The other two locations have been the subject of decoy operations for both alcohol and tobacco. They have passed (e.g., did not sell to the decoy) each time. (Exhibits E-F.)

12. The Respondents train all of their employees. The Respondents use a computer-based module which all employees must take when first hired. All employees must retake the training twice a year after that. Additionally, Kasondra shows potential employees how the register system works and asks them a series of questions to determine if they are aware of the laws relating to the sale of alcohol and can calculate the age of a patron attempting to purchase alcohol. Finally, the Respondents send their employees to the Department's LEAD training or LAPD's STAR training. (Exhibits B-C.)

13. The Respondents use a secret shopper program to test their employees' ability to follow their procedures. The employees are tested monthly by a secret shopper and receive green cards when they pass. (Exhibit G.) They receive red cards when they do not. Martinez received a red card prior to the sale in this case. Martinez was terminated after this incident.

14. The Respondents have placed signs throughout the Licensed Premises indicating that they check the ID of anyone who appears to be under the age of 30. (Exhibit H.) Additionally, Kasondra has installed security cameras which she can monitor remotely.

15. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(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.

2. Section 24200(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. Section 25658(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. Cause for suspension or revocation of the Respondents' license exists under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) on the basis that, on February 14, 2019, the Respondents' employee, Ricardo Martinez, inside the Licensed Premises, sold an alcoholic beverage to Hannah Green, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-10.)

5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2) and rule 141(b)(5)² and, therefore, the accusation should be dismissed pursuant to rule 141(c). With respect to rule 141(b)(2), the Respondents argued that Green was well-spoken and composed. This argument is rejected. Although Green testified that she was more confident at the Licensed Premises than she was at earlier locations, she was still nervous and may have been trembling. There was nothing about her appearance which made her appear older than her actual age, 18. Phrased another way, Green had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 10.)

6. With respect to rule 141(b)(5), the Respondents argued that there was no evidence that the citation was issued after the face-to-face identification as required by the rule. This argument misstates the burden of proof. Rule 141(b) sets forth the affirmative defenses to a sale of alcohol to a decoy. As an affirmative defense, the Respondents must demonstrate that the citation was issued before the face-to-face identification. There is no such evidence and, therefore, the Respondents have failed to meet their burden of proof on this issue.

PENALTY

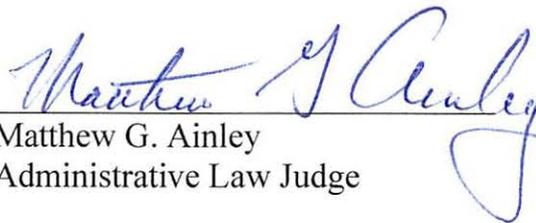
The Department requested that the Respondents' license be suspended for a period of 15 days, based on the relatively short time they have been licensed and the ineffectiveness of their training programs. The Respondents argued that a mitigated 5-day suspension would be appropriate if the accusation were sustained based on their training, supervision, and testing of their employees as well as Kasondra's disciplinary history at all of her stores. (Findings of Fact ¶¶ 11-14.) The Respondents' relatively short licensed history (3 ½ years) and the fact that the clerk had failed to follow procedure when tested by a secret shopper prior to this incident offsets any mitigation. The penalty recommended herein complies with rule 144.

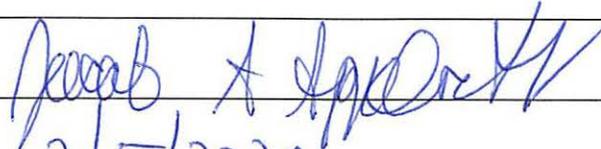
² All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

ORDER

The Respondents' off-sale beer and wine license is hereby suspended for a period of 15 days.

Dated: December 17, 2019


Matthew G. Ainley
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: <u>2/5/2020</u>