

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

AB-9978

File: 20-421771; Reg: 23092936

7-ELEVEN INC., PAWAN KUMAR, and POONAM KUMAR,
dba 7-Eleven Store #2133-18823E
5810 Hollister Avenue
Goleta, CA 93117,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: December 8, 2023
Videoconference

ISSUED DECEMBER 11, 2023

Appearances: *Appellants:* Adam N. Koslin, of Solomon, Saltsman & Jamieson, as
counsel for 7-Eleven Inc., Pawan Kumar, and Poonam Kumar,

Respondent: Erica M. Navarro, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

7-Eleven Inc., Pawan Kumar, and Poonam Kumar, doing business as 7-Eleven Store #2133-18823E (appellants), appeal from a decision of the Department of Alcoholic Beverage Control (Department)¹ 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).²

¹The decision of the Department, dated July 3, 2023, is set forth in the appendix.

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

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on February 14, 2005. The record shows two prior incidents of discipline against the license for violations of §25658(a), in 2017 and 2019. (Finding of Fact (FF) ¶¶3; Exh. 1.)

On January 27, 2023, the Department filed a single-count accusation against appellants charging that, on May 25, 2022, appellants' clerk, Olivia Rodriguez (the clerk), sold an alcoholic beverage to 19-year-old Ifrah Ahmad (the decoy). Although not noted in the accusation, the decoy was working for the Santa Barbara County Sheriff's (SBCS) Office at the time.

At the administrative hearing held on May 18, 2023, documentary evidence was received and testimony concerning the sale was presented by the decoy and by SBCS Sergeant Joshua Cockrell.³ Co-licensee and appellant Pawan Kumar testified on appellants' behalf.

Testimony established that on May 25, 2022, the decoy entered the licensed premises and selected a can of Bud Light beer which she took to the counter. When it was her turn, the clerk told her the price and completed the sale without asking the decoy for identification and without asking any age-related questions.

The decoy exited the premises and then re-entered with Sgt. Cockrell, who asked the decoy who sold her the beer. The decoy pointed at the clerk and said that she had. A photograph of the decoy and clerk was taken (exh. 4), the clerk was issued a citation, and her employment at the premises was subsequently terminated.

³ Although the reporter's transcript refers to this witness as "Cocarell" the record indicates that the correct spelling is "Cockrell" which we use here. (Decision; Exh. J.)

The administrative law judge (ALJ) issued a proposed decision on May 24, 2023, sustaining the accusation and recommending a 15-day suspension of the license. The Department adopted the proposed decision in its entirety on June 26, 2023, and a certificate of decision was issued seven days later.

Appellants then filed a timely appeal contending: (1) the Department failed to show good cause that continuation of appellants' license would harm the public welfare or morals (Appellants' Opening Brief (AOB) at pp. 4-5), and (2) appellants did not "permit" the violation because they took all reasonable precautions. Accordingly, they argue their employee's actions should not be imputed to them. (AOB at pp. 5-6.)

DISCUSSION

I

PUBLIC WELFARE AND MORALS

Appellants maintain the Department failed to show good cause that continuation of appellant's license would harm the public's welfare or morals — in other words, that the charge in the accusation is not supported by substantial evidence absent such showing.

This Board is bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence. The standard of review is as follows:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to

substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

When findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department—all conflicts in the evidence must be resolved in favor of the Department's decision. (*Kirby v. Alcoholic Bev. Control Appeals Bd. (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815]; Harris v. Alcoholic Beverage Control Appeals Board (1963) 212 Cal.App.2d 106 [28 Cal.Rptr.74].*)

Therefore, when the Board examines a decision of the Department, to determine whether it is supported by substantial evidence, it leads us to consider, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. The Appeals Board cannot disregard or overturn a finding of fact by the Department merely because a contrary finding would be equally or more reasonable. (Cal. Const. Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113]; Harris, supra, at 114.*)

Article XX, section 22 of the California Constitution authorizes the Department to take disciplinary action to protect the public:

The department shall have the power, in its discretion, to deny, suspend, or revoke any specific alcoholic beverage license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals.

This general authority, however, does not mean that every violation must be specifically proven to be contrary to public welfare or morals. The criteria for establishing good cause for discipline has been explained as follows:

In order to establish good cause for suspension or revocation of an alcoholic beverage license due to violations of law that do not involve moral turpitude, there must be a rational relationship between the offense and the operation of the licensed business in a manner consistent with public welfare and morals or there must be evidence that the offense had an actual effect on the conduct of the licensed business.

(H.D. Wallace & Associates, Inc. v. Dept. of Alcoholic Bev. Control (1969) 271 Cal.App.2d 589, 593-594 [76 Cal.Rptr. 749].)

In contrast to the position appellants would have us take, previous courts have found that specific findings need not be made on whether conduct charged in an accusation is deleterious to public welfare and morals. In *Schieffelin*, the court found:

To the extent that Schieffelin argues that the Department failed to make a specific finding that its conduct was injurious to public welfare or morals, we note that **both the California Supreme Court and this court have held that a finding that a licensee has violated provisions of the Alcoholic Beverage Control Act is tantamount to a finding of injury to public welfare and morals.** (*Martin v. Alcoholic Bev. etc. Appeals Bd.* (1959) 52 Cal.2d 287, 291 [341 P.2d 296]; *Mercurio v. Dept. Alcoholic etc. Control* (1956) 144 Cal. App. 2d 626, 631 [301 P.2d 474] (*Mercurio*).)

In *Mercurio*, this court held that a finding that licensees had violated a Department rule was in effect a finding that the licensees' acts were contrary to public welfare and morals because the rule itself was an articulation of acts which the Department found to be contrary to public welfare and morals. (*Ibid.*)

Similarly, the Legislature has already determined that the Alcoholic Beverage Control Act is intended "for the protection of the safety, welfare, health, peace, and morals of the people of the State" and that the act

involves “in the highest degree” the “moral well-being” of the state and its people. (See Business and Professions Code Section 23001.)^[fn.]

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (2005), 128 Cal.App.4th 1195, 1217 [27 Cal.Rptr.3d 766] (*Schieffelin*), emphasis added.)

We have reviewed the entire record and it supports the ALJ’s findings and conclusions. Nothing more is required to establish that substantial evidence supports this decision.

II

LICENSEE’S RESPONSIBILITY

Appellants assert in their opening brief: “[a]ppellants should not have their clerk’s actions automatically imputed to them through the rule of *respondeat superior*.” (AOB at p. 6.) We disagree with this assertion, and with appellants’ interpretation of the cases on this subject. Both this Board and the courts have consistently found that a licensee may be held liable for the actions of his agents or employees.

The owner of a liquor license has the responsibility to see to it that the license is not used in violation of law and as a matter of general law the knowledge and acts of the employee or agent are imputable to the licensee. [Citation.]

(*Harris v. Alcoholic Beverage Control Appeals Board* (1961) 197 Cal.App.2d 172, 180 [17 Cal.Rptr. 315].)

The *Laube* court noted:

A licensee has a general, affirmative duty to maintain a lawful establishment. Presumably this duty imposes upon the licensee the obligation to be diligent in anticipation of reasonably possible unlawful activity, and to instruct employees accordingly.

(*Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779].)

Similarly, in *Reimel* the court stated:

[A] licensee can draw no protection from his lack of knowledge of violations committed by his employees or from the fact that he has taken reasonable precautions to prevent such violations. There is no requirement . . . that the licensee have knowledge or notice of the facts constituting its violation. [Citations.]

(*Reimel v. Alcoholic Bev. Control Appeals Bd.* (1967) 252 Cal.App.2d 520, 522 [60 Cal.Rptr. 641], internal quotations omitted.)

The doctrine of *respondeat superior* provides that an employer or principal is vicariously liable for the wrongful conduct of his or her employees or agents committed within the scope of the employment or agency. (*Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 967 [227 Cal.Rptr. 106].) And, it is well-settled in alcoholic beverage case law that an agent or employee's on-premises knowledge and misconduct is imputed to the licensee/employer. (See *Yu v. Alcoholic Bev. Control Appeals Bd.* (1992) 3 Cal.App.4th 286, 295 [4 Cal.Rptr.2d 280]; *Kirby v. Alcoholic Bev. Control Appeals Bd.* (1973) 33 Cal.App.3d 732, 737 [109 Cal.Rptr. 291].)

Indeed, earlier in *Laube*, the court observed that:

[T]he element of the licensee's knowledge of illegal and improper activity on his or her premises . . . may be either actual knowledge or constructive knowledge imputed to the licensee from the knowledge of his or her employees.

(*Laube, supra*, 2 Cal.App.4th at p. 367, citing *Fromberg v. Dept. of Alcoholic Bev. Control* (1959) 169 Cal.App.2d 230, 233-234 [337 P.2d 123].)

Appellants contend the sale of alcohol by their clerk to this minor decoy was “not a willful violation, but instead a failure to exercise sufficient caution to scrutinize every single purchaser” and suggests that “[s]uch a case, particularly where the licensee immediately terminates the offending employee and has documented evidence of

significant training and oversight efforts, should be considered ‘an exception to the general rule’ of imputation of employee action to the employer.” (AOB at pp. 6-7.) We decline to find such an exception in this case.

ORDER

The decision of the Department is affirmed.⁴

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

⁴ 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.* Service on the Board pursuant to California Rules of Court (Rule 8.25) should be directed to: 400 R Street, Ste. 320, Sacramento, CA 95811 and/or electronically to: abcboard@abcappeals.ca.gov.

APPENDIX

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

**IN THE MATTER OF THE ACCUSATION
AGAINST:**

7-ELEVEN INC., PAWAN KUMAR & POONAM
KUMAR
7-ELEVEN #2133-18823E
5810 HOLLISTER AVE
GOLETA, CA 93117

OFF-SALE BEER AND WINE - LICENSE

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

VENTURA DISTRICT OFFICE

File: 20-421771

Reg: 23092936

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 June 26, 2023. 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. The appeal must be filed within 40 calendar days from the date of the decision, unless the decision states it is to be "effective immediately" in which case an appeal must be filed within 10 calendar days after the date of the decision. Mail your written appeal to the Alcoholic Beverage Control Appeals Board, 400 R St, Suite 320, Sacramento, CA 95811. For further information, and detailed instructions on filing an appeal with the Alcoholic Beverage Control Appeals Board, see: <https://abcab.ca.gov> or call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.

On or after August 14, 2023, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: July 3, 2023



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., Pawan Kumar & Poonam Kumar	}	File: 20-421771
dba 7-Eleven #2133-18823E	}	
5810 Hollister Ave.	}	Reg.: 23092936
Goleta, California 93117	}	
	}	License Type: 20
Respondents	}	
	}	Word Count: 12,800
	}	
	}	Reporter:
	}	Donna Cramin
	}	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 by videoconference on May 18, 2023.

Erica M. Navarro, Attorney, represented the Department of Alcoholic Beverage Control.

Jessop M. Stroman, attorney-at-law, represented respondents 7-Eleven Inc., Pawan Kumar, and Poonam Kumar. Pawan Kumar was present.

The Department seeks to discipline the Respondents' license on the grounds that, on or about May 25, 2022, the Respondents, through their agent or employee, sold, furnished, or gave alcoholic beverages to Ifrah Ahmad, 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 May 18, 2023.

FINDINGS OF FACT

1. The Department filed the accusation on January 27, 2023.

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 February 14, 2005 (the Licensed Premises).

3. The Respondents' license has been the subject of the following discipline:

<u>Date Filed</u>	<u>Reg. No.</u>	<u>Violation</u>	<u>Penalty</u>
7/3/2017	17085714	BP §25658(a)	5-day susp.
4/10/2019	19088712	BP §25658(a)	25-day susp.

The foregoing disciplinary matters are final. (Exhibits 2-3.)

4. Ifrah Ahmad was born on May 30, 2002. On May 25, 2022, she participated in a minor decoy operation conducted by the Santa Barbara County Sheriff's Department. On that date she was 19 years old.

5. On May 25, 2022, Ahmad was 5'6" tall and weighed 117 pounds. She wore a light gray top, denim pants, and a black jacket. Her hair was parted on top, braided, and tied into a bun in the back. (Exhibit 4.) Her appearance at the hearing was the same, except that she was 10 pounds lighter.

6. On May 25, 2022, Ahmad entered the Licensed Premises. She went to the coolers and selected a can of Bud Light beer, which she took to the counter. There were one or two people in line ahead of her. When it was her turn, the clerk, Olivia Rodriguez, told Ahmad the price, which she paid. Rodriguez gave Ahmad some change and Ahmad exited with the beer. Rodriguez did not ask to see Ahmad's ID nor did she inquire as to her age.

7. Ahmad re-entered the Licensed Premises with Sgt. J. Cockrell. Sgt. Cockrell asked Ahmad to identify the person who sold her the beer. Ahmad pointed to Rodriguez and said that she had. They were a few feet apart at the time, facing each other. A photo of the two of them was taken. (Exhibit 4.)

8. Ahmad had been a decoy once or twice before May 25, 2022. She volunteered to be a decoy after contacting the Santa Barbara Sheriff's Department's Isla Vista Station because she was interested in a career in law enforcement.

9. Pawan Kumar testified that he works at the Licensed Premises every day. He is responsible for hiring, firing, and training. He has new employees work next to him at the register so that he can demonstrate how the register works. For sales of age-restricted products, he shows them how to check IDs, including checking the date of birth, the photo, the expiration date, and the touch and feel of real IDs. All employees also have to

undergo 7-Eleven's computerized training. (Exhibits A-B & E.) After this incident, he required all of his employees to attend the Department's LEAD training. (Exhibits C-D.)

10. He and his wife, co-licensee Poonam Kumar, regularly remind employees to check IDs. They watch to make sure that they are doing so, both in person and through the Licensed Premises' video system.

11. The Respondents employ a secret-shopper program to ensure that their employees are following all rules and procedures. All of their employees have passed when tested.

12. Rodriguez was terminated as a result of making the sale at issue here.

13. Ahmad's appearance was consistent with her actual age, 19 years old. 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 May 25, 2022, Ahmad displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Rodriguez.

14. 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 May 25, 2022, the Respondents' employee, Olivia Rodriguez, inside the Licensed Premises, sold an alcoholic beverage to Ifrah Ahmad, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-8 & 13-14.)

5. The Respondents argued that there was insufficient evidence of a sale in this case. This argument is rejected. Ahmad testified credibly that Rodriguez sold an alcoholic beverage to her.

6. The Respondents did not raise any issues under rule 141.² They did note, however, that Ahmad was only five days shy of turning 20, at which point she could no longer be used as a decoy.

PENALTY

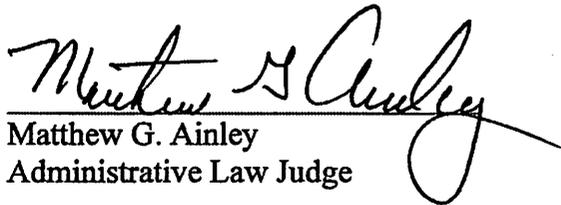
The Department requested that the Respondents' license be suspended for a period of 15 days, noting that any mitigation was offset by the two prior sales-to-minor violations. The Respondents emphasized that the training they provide to their employees and their use of the secret-shopper program constituted mitigation. They also argued that, under rule 144, the Ahmad's age warranted a mitigated penalty. The penalty recommended herein complies with rule 144.

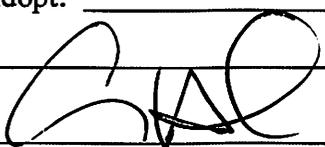
² All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

ORDER

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

Dated: May 24, 2023


Matthew G. Ainley
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By:  _____
Date: <u>06/20/23</u>