

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

AB-8528

File: 20-237628 Reg: 05060335

7-ELEVEN, INC., and MUSSIE O. KIDANE dba 7-Eleven 2232-20364
15105 Hesperian Boulevard, San Leandro, CA 94577,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Stewart A. Judson

Appeals Board Hearing: October 5, 2006
San Francisco, CA

ISSUED JANUARY 16, 2007

7-Eleven, Inc., and Mussie O. Kidane, doing business as 7-Eleven 2232-20364 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their off-sale beer and wine license for their clerk, Nana Agyemeg, having sold a six-pack of Bud Light beer to Andrew Fischer, a 19-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a). The violation was appellants' third within a 36-month period, and sixth since the license was issued in 1989.

Appearances on appeal include appellants 7-Eleven, Inc., and Mussie O. Kidane, appearing through their counsel, Barry Strike, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

¹The decision of the Department, dated February 2, 2006, is set forth in the appendix.

PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on November 8, 1989. On July 26, 2005, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage (beer) to a minor on December 10, 2004. The accusation also alleged prior sale-to-minor violations in 1990, 1991, 1994, 2003, and 2004.

An administrative hearing was held on November 16, 2005, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and ordered the license revoked.

Appellants thereafter filed a timely appeal. In their appeal, appellants contend that the findings are not supported by substantial evidence, the decision is not supported by the findings, the decision constitutes an abuse of discretion, and the penalty is excessive. Appellants do not contest the findings that there was a sale to a minor, or that the violation was the third in a 36-month period.

DISCUSSION

Appellants state that the key issue in this appeal is the timing and adequacy of the remedial steps taken by appellants following the three sale-to-minor violations - "It is apparent from the Decision that the fundamental consideration in imposing revocation in this case was the timing of steps taken by 7-Eleven to prevent further violations."

(App. Br., P. 3.) Appellants focus on portions of Determinations of Issues X² and XI,³

² Determination of Issues X states in full:

In the case at bar, the Department's primary concern appears to be the efforts that a co-licensee instituted to protect its interest in the license and to protect the public from repeated sales of alcoholic beverages to underage patrons. The evidence shows that those efforts, in this case, were belatedly taken. While the

contending they incorrectly state the evidence. They assert (App. Br. p. 3) that the ALJ's finding "that no steps were taken until after the third violation" was erroneous, and suggest that 7-Eleven was limited by its franchise relationship with respect to the timing of the steps it took.

The Department, while arguing that the findings as a whole support the decision, concedes that the findings in question would benefit from further clarification by the administrative law judge upon a remand to the Department for further consideration, and suggests such a remand would be an appropriate way to deal with the issue. Appellants' counsel agreed with the Department's suggestion that the case be remanded to the Department. Therefore, we do not reach the merits of the appeal.

ORDER

Counsel for the parties having agreed orally that the case be remanded to the Department for clarification of the challenged findings, IT IS SO ORDERED.

TINA FRANK, ACTING CHAIRPERSON
SOPHIE C. WONG, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

Department certainly retains the authority to exercise its discretion in an appropriate manner in a third-strike case, it is also true that "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. ABC Appeals Board* (1965) 62 Cal.2d 589).

³ Determination of Issues XI states, in full:

7-Eleven was aware of the two prior violations yet waited until after the third illegal sale before implementing the strong steps focused on the elimination of the problem. Considering the violation (third-strike), the findings pertaining thereto and the legislature's patent concern regarding sales to minors, the imposition of the Department's requested discipline, while appearing harsh, falls within the ambit of *Harris, supra*.