

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

AB-8612

File: 20-395738 Reg: 06062287

7-ELEVEN, INC., ANJU BINDAL, and BILL H. BINDAL,
dba 7-Eleven Store # 2232-14194G
11920 Dublin Green Drive, Dublin, CA 94568,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: July 12, 2007
San Francisco, CA

ISSUED NOVEMBER 7, 2007

7-Eleven, Inc., Anju Bindal, and Bill H. Bindal, doing business as 7-Eleven Store # 2232-14194G (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Anju Bindal, and Bill H. Bindal, appearing through Bill Bindal, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew D. Botting.

¹The decision of the Department, dated August 24, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on February 18, 2003. On March 23, 2006, the Department filed an accusation against appellants charging that, on January 14, 2006, appellants' clerk, Harmit Singh (the clerk), sold an alcoholic beverage to 18-year-old Joseph McGlinchy. Although not noted in the accusation, McGlinchy was working as a minor decoy for the Department at the time.

At the administrative hearing held on July 11, 2006, documentary evidence was received and testimony concerning the sale was presented by McGlinchy (the decoy) and by co-appellant Bill Bindal. The Department's decision determined that the violation charged was proved and no defense was established.

Appellants then filed an appeal contending: 1) Rule 141(b)(4)² was violated; 2) appellants' franchisor controls their operation of the premises and has not provided needed equipment to prevent sales to minors; and 3) the penalty should be reduced because of their efforts to prevent illegal sales.

DISCUSSION

I

Department rule 141(b)(4) provides: "A decoy shall answer truthfully any questions about his or her age." If the rule is violated, a licensee has a complete defense to a sale-to-minor charge. (Rule 141(c).)

Appellants contend there was a sign on the door of the beer cooler that said, "How old are you? If under 21 do not touch this door." The decoy's action of opening the cooler door and taking out the beer, appellants argue, was giving an untruthful answer to a question about his age.

²References to rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

Appellants have waived this argument because they did not raise it at the hearing. Although they showed the decoy several photographs of signs in the store, appellants did not argue at the hearing that the signs were the equivalent of asking the decoy his age. In addition, the photographs were not offered or entered into evidence, the record does not indicate when the photographs were taken or what the signs said, and the decoy was positive that at least two of the signs depicted were not there when he was in the store; he could not recall whether the third was there. [RT 28-31, 39-41.]

Even if we were to consider this contention, we would have to reject it because we do not know if signs existed at the time of the decoy operation, and, if so, what they said. In addition, the Appeals Board has already rejected an argument very similar to that made by appellants.

In *To & Wang* (2007) AB-8513, the appellants argued that rule 141(b)(4) was violated when the decoy failed to tell them his true age after seeing a sign in the store that said, "If you don't look 40 or older, show your ID or no beer." The Board rejected this argument, saying:

We agree with the ALJ's conclusion that the signs posted in appellants' store cannot be considered a request for identification under the rule. This sign was simply a general statement of the store's purported policy, not a request or inquiry directed specifically to the decoy.

Appellants contend that the Department's decision says that, as a matter of law, the request must be verbal, which they point out, is not required by the rule. They are correct that the rule does not require a request to be verbal, but they are in error about the import of the Department's decision. The decision merely says that it is untenable to read the rule as requiring a response to a "generalized non-verbal inquir[y]." The plain meaning of the rule's language indicates that the request must be specific to the decoy. [¶] A general statement of store policy posted in the premises, even when as conspicuous as it was in this case, does not obligate a decoy to show his or her identification or state his or her age without some specific request to do so.

It appears that the Board's decision in *To & Wang, supra*, would provide a reasonable basis for rejecting appellants' contention if we were to consider it.

Appellants argue that their franchisor does not allow them to ask questions about age, and if they had been allowed to ask the decoy his age, the violation would not have occurred. [RT 62-66.] There is no guarantee, of course, that the clerk would have refused to sell to the decoy even if he had asked the decoy's age; he sold to the decoy even though he looked at the decoy's California driver's license, which clearly showed the decoy was under the age of 21. Appellants' apparent attempt to shift responsibility for the violation to their franchisor is unavailing. Their franchisor is also their co-licensee, and co-licensees are held severally and jointly liable for violations.

II

Appellants contend they are hampered in their attempts to comply fully with the law because their franchisor does not want them to ask the age of customers buying alcoholic beverages and has not provided them with equipment that would help them prevent age-restricted sales. (They did not specify what "equipment" they referred to, but we presume they mean an ID card scanner or something similar.) This information appears to be offered as mitigation.

Appellants' contentions with regard to asking the age of a customer before selling an alcoholic beverage are really irrelevant. The decoy was not asked his age, he was asked for his identification. He showed the clerk his California driver's license, clearly showing him to be under 21, yet the clerk went ahead with the sale.

Even if we were to accept appellants' assertions that they were prevented from asking about age, they had available another means of preventing the underage sale – asking for ID. For whatever reason, their clerk simply did not use the information he

was given by the decoy. There is no guarantee that the clerk would have refused the sale even if he had been permitted to ask the decoy's age.

III

Appellants ask the Board to reduce their penalty from a 15-day suspension to a warning, in light of their efforts to prevent illegal age-restricted sales.

The Appeals Board will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) 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 Bd.* (1965) 62 Cal. 2d 589, 594 [43 Cal.Rptr. 633].)

A 15-day suspension is standard for a first sale-to-minor violation under the Department's Penalty Schedule. (4 Cal. Code Regs., § 144.) Under the circumstances of this case, we cannot say that the standard penalty is an abuse of discretion.

ORDER

The decision of the Department is affirmed.³

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, 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.