

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

AB-8780

File: 20-214686 Reg: 07065169

7-ELEVEN, INC. and SUSAN E. WILSON, dba 7-Eleven No. 2173-26254
901 South Prairie Avenue, Inglewood, CA 90301,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: September 3, 2009
Los Angeles, CA

ISSUED NOVEMBER 23, 2009

7-Eleven, Inc. and Susan E. Wilson, doing business as 7-Eleven No. 2173-26254 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 10 days, all stayed for a one-year probationary period, for their clerk selling an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc. and Susan E. Wilson, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Alicia R. Ekland, and the Department of Alcoholic Beverage Control, appearing through its counsel, Valoree Wortham.

¹The decision of the Department, dated November 29, 2007, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1988. In 2007, the Department filed an accusation charging that their clerk sold an alcoholic beverage to 19-year-old Ryan Yee on December 29, 2006. Although not noted in the accusation, Yee was working as a minor decoy for the Department at the time.

At the administrative hearing held on October 10, 2007, documentary evidence was received and testimony concerning the sale was presented by Yee (the decoy) and by Department investigator Casteel. The Department's decision determined that the violation charged was proved and no affirmative defense to the charge was established. Appellants then filed an appeal contending that Rule 141(b)(2)² was violated and the penalty is excessive.

DISCUSSION

I

Rule 141(b)(2) requires that "[t]he decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense." Appellants point out that the decoy had a "muscular build," had worked for law enforcement agencies for a year and a half, and had visited "hundreds of locations" as a minor decoy before he went to appellants' premises. They contend that the decoy's physical appearance and confident demeanor made him appear to be over the age of 21. Therefore, they conclude, it was an abuse of discretion for the administrative law judge (ALJ) to find that the decoy's appearance complied with rule 141(b)(2).

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.

The ALJ devoted several paragraphs in the decision to the decoy's physical appearance, demeanor, and experience. He then made express findings (Findings of Fact II(D)(3) & (4)) that the decoy "spoke and acted like a typical nineteen year old and he does not have the appearance of someone over the age of twenty-one" and that he displayed "an overall appearance that could generally be expected of a person under twenty-one years of age." He made these findings after observing the decoy as he testified and being fully aware of the decoy's experience and training.

As this Board has said on many occasions, the ALJ is the trier of fact and has the opportunity, which this Board does not, of observing the decoy as he or she testifies. We are neither entitled nor in a position to second-guess the factual determination of the ALJ concerning the decoy's appearance. Appellants' partisan insistence that the ALJ was wrong does not show the palpable abuse of discretion that would cause this Board to stray from its usual deference to the ALJ'S determination. Appellants' contention is rejected.

II

Appellants contend that, in light of their long license history without a violation, imposing a penalty of 10 days' suspension, all stayed, was "clearly punitive" and an abuse of discretion. They assert the decision must be reversed because of this.

Appellants had about 18½ discipline-free years before this violation. The Department recommended, and the ALJ proposed, the penalty of an all-stayed 10-day suspension in recognition of the long history without a violation. Appellants argued that an all-stayed five-day suspension would be more appropriate.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971)

19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but 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 reasonable minds may differ with regard to the propriety of the discipline, no abuse of discretion has occurred. (*County of Los Angeles v. Civil Service Com.* (1995) 39 Cal.App.4th 620, 634 [46 Cal.Rptr. 2d 256].)

Since the standard penalty for a first sale-to-minor violation is a 15-day suspension, the penalty imposed clearly was mitigated. The penalty is not unreasonable or punitive just because appellants think a lesser penalty would be "more appropriate." There was no abuse of discretion shown in imposing the penalty.

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.