

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

AB-8949

File: 20-369959 Reg: 07067045

7-ELEVEN, INC., and GURMEET and HARJINDER WARAICH,
dba 7-Eleven # 2133-16769
804 West Cook Street, Santa Maria, CA 93458,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: December 2, 2010
Los Angeles, CA

ISSUED JANUARY 27, 2011

7-Eleven, Inc., and Gurmeet and Harjinder Waraich, doing business as 7-Eleven # 2133-16769 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days, with 5 days conditionally stayed, for their clerk selling an alcoholic beverage to a person under the age of 21, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Gurmeet and Harjinder Waraich, appearing through their counsel, Ralph B. Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

¹The decision of the Department, dated September 16, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on October 3, 2000. On October 15, 2007, the Department filed an accusation against appellants charging that their clerk sold an alcoholic beverage to 17-year-old Carlos Velasquez on August 31, 2007.

At the administrative hearing held on July 17, 2008, documentary evidence was received and testimony concerning the sale was presented by Velasquez; by Israel Hernandez, a Department investigator; and by Gurminder Singh, appellants' clerk. Co-licensee Gurmeet Waraich testified about policies and employee training with regard to the sale of alcoholic beverages at the licensed premises. Appellants filed an offer of proof and a brief in support of a subpoena they had served on District Administrator Judy Maddy. The Department moved to quash the subpoena, which the ALJ did.

The Department's decision determined that the violation charged was proved and no defense to the charge was established. Appellants then filed an appeal contending: (1) The ALJ erroneously prevented appellants from presenting evidence of the Department's use of an illegal underground regulation in determining the penalty to be imposed, and (2) the penalty is excessive.

DISCUSSION

I

Appellants contend that quashing the subpoena prevented them from presenting evidence of the Department's use of an illegal underground regulation in determining the penalty to be imposed.

The Board has addressed and rejected this argument before. (See, *e.g.*, *Yummy Foods LLC* (2010) AB-8950; *Randhawa* (2010) AB-8973; *Chevron Stations, Inc.* (2010)

AB-8974; *7-Eleven, Inc./ Wong* (2010) AB-8991; *7-Eleven, Inc./ Solanki* (2010) AB-9019.) Even if the District Administrator testified as the offer of proof said she would, that testimony would not establish that an underground regulation existed. Appellants' contention is rejected.

II

Appellants argue that the penalty is excessive because the ALJ did not "give proper weight" to all the mitigating factors they presented at the hearing. (App. Br. at p. 16.) They contend that all of the suspension should have been stayed, not just five of the 15 days imposed.

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 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].)

Appellants' disagreement with the penalty imposed does not mean the Department abused its discretion. Whether or not all the mitigating factors were given proper weight is not the concern of the Appeals Board; the Board's only concern is that the penalty imposed is not clearly unreasonable. It is not.

ORDER

The decision of the Department is affirmed.²

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

²This 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.