

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

AB-9249

File: 20-447420 Reg: 11075162

7-ELEVEN, INC., PAWANJIT KAUR, and GURMEET SINGH SIDHU
dba 7-Eleven Store 2237 13926D
1629 East Ashlan Avenue, Fresno, CA 93704-3938,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

Appeals Board Hearing: January 3, 2013
Sacramento, CA

ISSUED FEBRUARY 5, 2013

7-Eleven, Inc., Pawanjit Kaur, and Gurmeet Singh Sidhu, doing business as 7-Eleven Store 2237 13926D (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., Pawanjit Kaur, and Gurmeet Singh Sidhu, appearing through their counsel, Ralph Barat Saltsman and D. Andrew Quigley, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kelly Vent.

¹The decision of the Department, dated September 26, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on February 21, 2007. On May 26, 2011, the Department filed an accusation against appellants charging that, on May 2, 2011, appellants' unidentified clerk sold an alcoholic beverage to 19-year-old Judy Gutierrez. Although not noted in the accusation, Gutierrez was working as a minor decoy for the Fresno Police Department at the time.

At the administrative hearing held on December 21, 2011, documentary evidence was received and testimony concerning the sale was presented by Gutierrez (the decoy) and by Lori Kohman, a Department Investigator. Appellants presented no witnesses. At the request of the Administrative Law Judge (ALJ), the parties stipulated that there had been no record of disciplinary action against the premises since the issuance of the license.

The Department's decision determined that the violation charged was proved and no defense was established.

Appellants then filed an appeal contending that the ALJ abused his discretion and failed to proceed in the manner required by law by failing to consider or give proper weight to appellants' disciplinary record as evidence of mitigation.

DISCUSSION

Appellants contend that the ALJ abused his discretion by failing to consider or give appropriate weight to appellants' 51-month discipline-free history as evidence of mitigation.

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].)

Unless some statute requires it, an administrative agency's decision need not include findings with regard to mitigation. (*Vienna v. California Horse Racing Bd.* (1982) 133 Cal.App.3d 387, 400 [184 Cal.Rptr. 64]; *Otash v. Bureau of Private Investigators* (1964) 230 Cal.App.2d 568, 574-575 [41 Cal.Rptr. 263].) Appellants have not pointed out a statute with such requirements. Findings regarding the penalty imposed are not necessary as long as specific findings are made that support the decision to impose disciplinary action. (*Williamson v. Board of Medical Quality Assurance* (1990) 217 Cal.App.3d 1343, 1346-1347 [266 Cal.Rptr. 520].)

Appellants do not dispute that the Department's findings support the decision to impose disciplinary action. Because this requirement has been satisfied, we can find no abuse of discretion based on the lack of findings regarding mitigation.

Appellants, however, present a somewhat different argument, instead challenging the ALJ's conclusion that appellants "failed to establish any evidence to mitigate the standard penalty for a first time offense of selling an alcoholic beverage to a minor." (Determination of Issues ¶ IV.) During the administrative hearing, the parties

stipulated that, prior to the present violation, the premises had remained discipline-free since the issuance of the license on February 27, 2007. [RT 7.] The ALJ acknowledged this disciplinary record when he noted that “Respondents have been licensed with an Off-Sale Beer and Wine License by the Department since February 21, 2007, with no record of disciplinary action.” (FF ¶ I.) Appellants assert that their stipulated 51-month discipline-free history constitutes evidence of mitigation, which the ALJ either failed to grant sufficient weight or ignored entirely.

Appellants’ argument is flawed. The ALJ did not conclude that no evidence was presented whatsoever; he concluded that appellants presented “no evidence *to mitigate the standard penalty*.” (Determination of Issues ¶ IV, emphasis added.) Essentially, appellants take issue not only with the ALJ’s failure to discuss their disciplinary record when making his penalty determination, but with his failure to characterize it as mitigating evidence.

Whether appellants’ evidence serves to mitigate the standard penalty is a discretionary determination left in the hands of the ALJ. Depending on the facts of the individual case, a stipulated 51 months without a violation may indeed constitute mitigating evidence; in other cases, such as appellants’, the ALJ may determine that the same time period does *not* mitigate the penalty. Either way, the law is clear: the ALJ is not required to make findings regarding the penalty imposed.

A 15-day suspension is reasonable. We find no abuse of discretion.

ORDER

The decision of the Department is affirmed.²

BAXTER RICE, CHAIRMAN
FRED HIESTAND, 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.