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

AB-9397
File: 20-484439 Reg: 13078876

7-ELEVEN, INC. and IBEK, INC.,
dba 7-Eleven Store 2367 14288A
404 6th Street, San Jose, CA 95112,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: July 10, 2014
San Francisco, CA

ISSUED AUGUST 5, 2014

7-Eleven, Inc. and Ibek, Inc., doing business as 7-Eleven Store 2367 14288A (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 25 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. and Ibek, Inc., appearing through their counsel, Ralph Barat Saltsman and Jennifer L. Carr, and the Department of Alcoholic Beverage Control, appearing through its counsel, Heather Hoganson.

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[1]The decision of the Department, dated December 13, 2013, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on December 14, 2009. On July 12, 2013, the Department filed an accusation against appellants charging that, on June 15, 2013, appellants' clerk, Chia Ko (the clerk), sold an alcoholic beverage to 17-year-old Max M. Although not noted in the accusation, Max was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on November 13, 2013, documentary evidence was received and testimony concerning the sale was presented by Max M. (the decoy); by Richard Barone, a Department of Alcoholic Beverage Control agent; and by Kyle Truong, president of the co-licensee corporation Ibek, Inc.

Testimony established that on the date of the operation, appellants' clerk sold a can of Bud Light beer to the decoy. Before completing the sale, the clerk asked to see the decoy's identification. The decoy produced his valid California driver's license, which bore his date of birth, March 17, 1996, and a red stripe with the words "AGE 21 in 2017." Despite this, the clerk proceeded with the sale.

Additionally, Truong testified that appellants' employees receive training, via a tutorial video, on the sale of alcoholic beverages. The training is given upon hire and repeated annually. Appellants also employ "secret shoppers," who attempt to purchase alcoholic beverages in order to test whether employees check identification. Finally, appellants' owner and manager often remind employees to check identification.

The Department's decision determined that the violation charged was proved and no defense was established. In assigning the penalty, the ALJ declined to find mitigation, and observed that "[t]raining employees regarding the laws pertaining to the sale of alcoholic beverages is something that any prudent licensee should do as a

matter of course." Appellants' license was suspended twenty-five days.

Appellants then filed this appeal contending that the ALJ failed to proceed in the manner required by law when he chose to ignore mitigating evidence, including appellants' training scheme and use of secret shoppers.

DISCUSSION

Appellants contend that the ALJ failed to proceed in the manner required by law when he concluded that the evidence of training procedures and positive corrective measures were legally insufficient to support a mitigated penalty. According to appellants, the Department is obligated, under rule 144, to accept "positive action by the licensee to correct the problem" and "documented training of licensee and employees" as evidence of mitigation.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant. (*Joseph's of Cal. v. Alcoholic Bev. Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183].) However, it will not disturb the Department's penalty order absent an abuse of discretion. (*Martin v. Alcoholic Bev. 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 Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Department rule 144, which sets forth the Department's penalty guidelines, provides that "higher or lower penalties . . . *may be recommended* based on the facts of individual cases where generally supported by aggravating or mitigating circumstances."

(Cal. Code Regs., tit. 4, § 144, emphasis added.)

Rule 144 itself addresses the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

> **Penalty Policy Guidelines:** The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.
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> ¶ . . . ¶
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> Mitigating factors *may include*, but are not limited to:
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> 1. Length of licensure . . . without prior discipline problems
> 2. Positive action by the licensee to correct problem
> 3. Documented training of licensee and employees

Appellants do not dispute that the Department's findings support the decision to impose disciplinary action. Instead, they take issue with one of the final paragraphs in the decision:

> Respondents requested mitigation of their penalty, noting the training which they provide their employees and their use of secret shoppers. The request is denied. Training employees regarding the laws pertaining to the sale of alcoholic beverages is something that any prudent licensee should do as a matter of course. And, Respondents' use of secret shoppers obviously did not serve any useful purpose in this case, as Respondents' clerk, after checking the decoy's driver license, either did not notice he was under twenty-one years old, or having noticed it, still sold the beer to him.

(Determination of Issues V.) They contend the decision is at odds with the law because rule 144 contains an "express requirement to consider such efforts as mitigation."

(App.Br. at p. 6.) They contend further that "[i]f the fact that a sale to minor occurred nullified evidence of training and proactive steps to prevent sales to minors, then evidence of training and proactive steps would never support mitigation of a penalty." (*Ibid*.)

Appellants are misguided. First, there is no such "express requirement" anywhere in rule 144. The rule sets forth guidelines, then places the discretion firmly in the hands of the Department to determine whether aggravation or mitigation is in order. In fact, rule 144 expressly uses *permissive* language with regard to mitigation: "[h]igher or lower penalties *may be recommended* based on the facts of individual cases." The list of possible mitigating factors is, in keeping with the rest of the rule, simply a set of noninclusive guidelines. That portion of the rule uses permissive language as well, stating that "[m]itigating factors *may* include" those listed. There is no language in the rule mandating that the ALJ mitigate the penalty.

Second, appellants are incorrect when they conclude that the holding in the present case precludes any finding of mitigation based on training or other proactive steps. Rule 144 provides that deviation from the penalty guidelines is a discretionary determination "based on the facts of individual cases." In this case, the training and "secret shopper" program appellants offer as evidence of mitigation were in place before the violation occurred. Clearly, these measures were insufficient to prevent the sale of alcohol to minors. There is no reason to believe they will be sufficient to prevent additional violations in the future. It was therefore fully within the ALJ's discretion, based on the facts of this case alone, to refuse to mitigate the penalty. Moreover, the penalty determination in this case is in no way binding on other cases.

The penalty of 25 days' suspension is reasonable for a second sale-to-minor

violation, and we therefore affirm.

ORDER

The decision of the Department is affirmed.[2]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[2]This 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.