

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

AB-9706

File: 20-421771; Reg: 17085714

7-ELEVEN, INC., PAWAN KUMAR, and POONAM KUMAR,
dba 7-Eleven Store #2133-18823E
5810 Hollister Avenue, Goleta, CA 93117,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: November 1, 2018
Ontario, CA

ISSUED NOVEMBER 21, 2018

Appearances: *Appellants:* Ralph Barat Saltsman and Donna J. Hooper, of
Solomon, Saltsman & Jamieson, as counsel for 7-Eleven, Inc.,
Pawan Kumar, and Poonam Kumar,

Respondent: Kerry K. Winters, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

7-Eleven, Inc., Pawan Kumar and Poonam Kumar, doing business as 7-Eleven Store #2133-18823E, appeal from a decision of the Department of Alcoholic Beverage Control,¹ suspending their license for 5 days because their clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

¹The decision of the Department under Government Code section 11517, subdivision (c), dated May 10, 2018, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on February 14, 2005.

There is no record of prior departmental discipline against the license.

On July 3, 2017, the Department filed an accusation against appellants charging that, on November 5, 2016, appellants' clerk, Sergio Ramirez (the clerk), sold an alcoholic beverage to 18-year-old Gage Flick. Although not noted in the accusation, Flick was working as a minor decoy in a joint operation between the Santa Barbara Sheriff's Department and the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on October 25, 2017, documentary evidence was received and testimony concerning the sale was presented by Flick (the decoy); by Department Supervising Agent Vic Duong; and by licensees Pawan Kumar and Poonam Kumar.

Testimony established that on November 5, 2016, Deputy Trujillo entered the licensed premises in an undercover capacity, followed shortly thereafter by the decoy. The decoy went to the coolers where he selected a six-pack of Firestone Walker 805, an alcoholic beverage. He took the six-pack to the register, and when it was his turn he handed it to the clerk — who scanned it and completed the sale without asking for identification and without asking any age-related questions. The decoy exited the premises, then re-entered with sheriff's deputies and Department Agent Duong to make a face-to-face identification of the clerk. These facts are not at issue in this appeal.

On November 9, 2017, the administrative law judge (ALJ) submitted a proposed decision, sustaining the accusation and recommending a 5-day suspension. The Department served the proposed decision on the parties on November 22, 2017 with a letter soliciting comments on the decision. The Department submitted comments

arguing for an increase in the penalty. Appellants submitted comments arguing that the penalty should not be increased.

The Department initially rejected the ALJ's proposed decision. It advised the parties that the Department had considered but did not adopt the proposed decision, and that it would decide the case pursuant to section 11517(c).² The Notice Pursuant to Government Code Section 11517(c)(E), dated March 13, 2018, invited the parties to submit written argument. Both appellants and the Department submitted briefs on the penalty issue. Thereafter, on May 19, 2018, the Department issued its Decision Under Government Code Section 11517(c), adopting the proposed decision in its entirety.

Appellants then filed a timely appeal, on June 8, 2018.

DISCUSSION

Appellants contend that the ALJ failed to proceed in a manner required by law when he failed to consider all of appellants' mitigating evidence in determining the penalty. (AOB at pp. 7-12.)

This Board may examine the issue of excessive penalty if it is raised by an

²Government Code § 11517(c)(2), in pertinent part, allows the Director to:

- (A) Adopt the proposed decision in its entirety.
- (B) Reduce or otherwise mitigate the proposed penalty and adopt the balance of the proposed decision.
- (C) Make technical or other minor changes in the proposed decision and adopt it as the decision. . . .
- (D) Reject the proposed decision and refer the case to the same administrative law judge if reasonably available, otherwise to another administrative law judge, to take additional evidence. . . .
- (E) Reject the proposed decision, and decide the case upon the record, including the transcript, or upon an agreed statement of the parties, with or without taking additional evidence. . . .

(Cal. Gov. Code § 11517(c)(2).)

appellant (*Joseph's of Cal. v. Alcoholic Bev. 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 Bev. Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) "Abuse of discretion" in the legal sense is defined as discretion exercised to an end or purpose not justified by and clearly against reason, all of the facts and circumstances being considered. [Citations.] (*Brown v. Gordon*, 240 Cal.App.2d 659, 666-667 (1966) [49 Cal.Rptr. 901].)

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 its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Rule 144 provides:

In reaching a decision on a disciplinary action under the Alcoholic Beverage Control Act (Bus. and Prof. Code Sections 23000, et seq.), and the Administrative Procedures Act (Govt. Code Sections 11400, et seq.), the Department shall consider the disciplinary guidelines entitled "Penalty Guidelines" (dated 12/17/2003) which are hereby incorporated by reference. Deviation from these guidelines is appropriate where the Department in its sole discretion determines that the facts of the particular case warrant such a deviation - such as where facts in aggravation or mitigation exist.

(Cal. Code Regs., tit. 4, § 144.)

Among the mitigating factors provided by the rule are the length of licensure without prior discipline, positive actions taken by the licensee to correct the problem, cooperation by the licensee in the investigation, and documented training of the licensee and employees. Aggravating factors include, *inter alia*, prior disciplinary history, licensee involvement, lack of cooperation by the licensee in the investigation,

and a continuing course or pattern of conduct. (*Ibid.*)

The Penalty Policy Guidelines further address 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.

In the decision, a separate section is devoted to the issue of penalty and the factors considered by the ALJ in favor of imposing a lesser or greater penalty than that recommended by rule 144:

The Department requested that the Respondents' license be suspended for a period of 15 days, arguing that the mitigating and aggravating factors offset each other. In the Department's view, despite the Respondents' 11½ years of discipline-free operation, the Respondents failed to properly train or supervise Sergio Ramirez, a new employee, which led to the violation at issue. The Respondents argued that a 10-day suspension, all stayed, was appropriate based on their lengthy discipline-free history and their extensive training program.

The Respondent's [*sic*] discipline-free history certainly warrants mitigation. With respect to the Respondents' training program, it is neither as bad as the Department alleges nor as good as the Respondents believe. It borders on axiomatic that new employees in any field will typically make more mistakes than experienced employees. The mere fact that Ramirez, a new employee, sold an alcoholic beverage to a minor, does not warrant aggravation. On the other hand, his action in hitting the visual ID OK button when faced with a person who clearly was not over the age of 40—rather than asking for ID—indicates that the training [was] not entirely

effective in this case. In short, no mitigation nor aggravation is warranted based on the training program. The penalty recommended herein complies with rule 144.

(Decision, at p. 4.) Following this discussion, the ALJ recommended a penalty of 5-days' suspension.

Appellants' disagreement with the penalty imposed does not mean the Department abused its discretion. This Board's review of a penalty looks only to see whether it can be considered reasonable, and, if it is reasonable, the Board's inquiry ends there. "[T]he propriety of the penalty to be imposed rests solely within the discretion of the Department whose determination may not be disturbed in the absence of a showing of palpable abuse." (*Rice v. Alcoholic Bev. Control Appeals Bd.* (1979) 89 Cal.App.3d 30, 39 [152 Cal.Rptr. 285].) The Board is simply not empowered to reach a contrary conclusion from that of the Department if the underlying decision is reasonable.

The penalty imposed here comports with the Department's penalty guidelines pursuant to rule 144, and is entirely reasonable based on the record in this case.

ORDER

The decision of the Department is affirmed.³

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
MEGAN McGUINNESS, 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.

APPENDIX

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

**IN THE MATTER OF THE ACCUSATION
AGAINST:**

7-Eleven, Inc., Pawan Kumar and Poonam
Kumar
Db a 7-Eleven Store #2133-18823E
5810 Hollister Ave
Gloeta, CA 93117

Licensee(s).

File No.: 20-421771

Reg. No.: 17085714

RECEIVED

MAY 10 2018

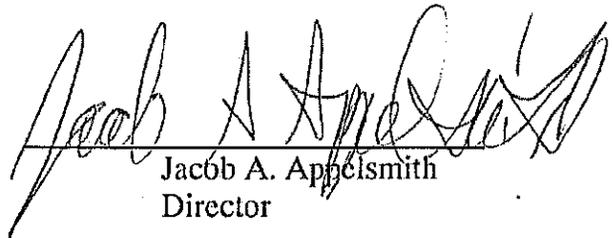
Alcoholic Beverage Control
Office of Legal Services

DECISION UNDER GOVERNMENT CODE SECTION 11517(c)

The above-entitled matter having regularly come before the Department on May 10, 2018, for decision under Government Code Section 11517(c) and the Department having considered its entire record, including the transcript of the hearing held on October 25, 2017, before Administrative Law Judge Matthew G. Ainley, and the written argument of the parties, and good cause appearing, the proposed decision of the Administrative Law Judge dated November 9, 2017, is hereby adopted as the decision of the Department.

Sacramento, California

Dated: May 10, 2018


Jacob A. Appelsmith
Director

Pursuant to Government Code section 11521(a), any party may petition for reconsideration of this decision. The Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or on the effective date of the decision, whichever is earlier.

Any appeal of this decision must be made in accordance with Chapter 1.5, Articles 3, 4 and 5, Division 9, of the Business and Professions Code. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF THE ACCUSATION AGAINST:

7-Eleven Inc., Pawan Kumar & Poonam Kumar	}	File: 20-421771
dba 7-Eleven #2133-18823E	}	
5810 Hollister Ave.	}	Reg.: 17085714
Goleta, California 93117	}	
	}	License Type: 20
Respondents	}	
	}	Word Count: 24,000
	}	
	}	Reporter:
	}	Cameron Hop
	}	Kennedy Court Reporters
	}	
<u>Off-Sale Beer and Wine License</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Santa Barbara, California, on October 25, 2017.

Jacob L. Rambo, Chief Counsel, represented the Department of Alcoholic Beverage Control.

Donna J. Hooper, attorney-at-law, represented respondents 7-Eleven Inc., Pawan Kumar, and Poonam Kumar. Pawan Kumar and Poonam Kumar present.

The Department seeks to discipline the Respondents' license on the grounds that, on or about November 5, 2016, the Respondents, through their agent or employee, sold, furnished, or gave alcoholic beverages to Gage Flick, an individual under the age of 21, in violation of Business and Professions Code section 25658(a).¹ (Exhibit 1.)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on October 25, 2017.

FINDINGS OF FACT

I. The Department filed the accusation on July 3, 2017.

¹ All statutory references are to the Business and Professions Code unless otherwise noted.

2. The Department issued a type 20, off-sale beer and wine license to the Respondents for the above-described location on February 14, 2005 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondents' license.
4. Gage Flick was born on November 21, 2017. He served as a minor decoy during an operation conducted by the Santa Barbara's Sheriff's Department on November 5, 2016. On that date he was 18 years old.
5. Flick appeared and testified at the hearing. On November 5, 2016, he was 6'1" tall and weighed 170 pounds. He wore a collarless shirt, jeans, and a black jacket. He had a watch on his left wrist. His hair was short on the sides and longer on top. He shaved before the operation commenced at the suggestion of the deputies. (Exhibits 6, 7 & 9.) His appearance at the hearing was the same, except that he was five pounds heavier and he had a thin goatee.
6. On November 5, 2016, Dep. Trujillo entered the Licensed Premises, followed a short time later by Flick. Flick went to the refrigerators and selected a six-pack of Firestone Walker 805. Firestone Walker 805 is an alcoholic beverage, containing 4.7% alcohol by volume. (Exhibits 3-5.)
7. Flick took the six-pack of Firestone Walker 805 to the front counter and got in line behind two other people. When it was his turn, he handed the six-pack to the clerk, Sergio Ramirez. Ramirez scanned the Firestone Walker 805 and Flick paid. Flick picked up the six-pack and exited the Licensed Premises.
8. Outside, Flick handed the Firestone Walker 805 to one of the deputies, then re-entered the Licensed Premises with them. The deputies contacted Ramirez, identified themselves, and explained the violation to him. Supv. Agent Vic Duong asked Flick to identify the person who sold him the alcohol. He pointed to Ramirez and said that he had. Flick and Ramirez were approximately six feet apart at the time, facing each other. A photo of the two of them was taken (exhibit 9), after which Ramirez was cited.
9. November 5, 2016 was Flick's second time acting as a decoy. His first time had been the day before, November 4, 2016. He learned of the decoy program through his father, a deputy with the Santa Barbara Sheriff's Department. Of the three locations he visited on November 5, 2016, the Licensed Premises and one other sold alcoholic beverages to him.
10. Flick appeared his age at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in the Licensed Premises on November 5, 2016, Flick displayed the appearance which could generally be

expected of a person under 21 years of age under the actual circumstances presented to Ramirez.

11. The Respondents require all employees to undergo 7-Eleven's Come of Age computer training before they begin working the register. This training concludes with a test which the employees must pass. The Respondents further require their employees to be re-tested every year. Whenever an age-restricted product is rung up, the register displays a prompt asking the clerk to verify the age of the purchaser. (Exhibit 10.) The Respondents' policy is to have their employees card anyone who appears to be under the age of 40. The Respondents spot-check transactions from time to time to ensure that their employees are asking to see ID and properly entering the information into the record. They also employ a secret shopper program to test whether their employees are asking to see ID.

12. In this case, Ramirez did not ask to see any ID, nor did he inquire into Flick's age. Instead, he pressed the "Visual ID OK" button on the register. (Exhibit 10.) The Respondents did not offer any evidence to explain Ramirez's failure to ask for ID in this case. The Visual ID OK button has since been removed.

13. The Respondents spoke to all employees after this incident and emphasized the importance of checking ID. Ramirez, who had only been working at the Licensed Premises since October 26, 2016, was taken off the register and re-trained. Ramirez subsequently was terminated because he was unable to handle the job.

14. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.

2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.

3. Section 25658(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.

4. Cause for suspension or revocation of the Respondents' license exists under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) on the basis that, on November 5, 2016, the Respondents' clerk, Sergio Ramirez, inside the Licensed Premises, sold an alcoholic beverage to Gage Flick, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-10 & 12.)

5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2)² and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondents argued that Flick appeared to be around 25 years old, particular in light of the photos. This argument is rejected. Flick's appearance, both at the hearing and in the photos, was not only consistent with that of a person under the age of 21, but consistent with that of an 18-year-old, his actual age. (Finding of Fact ¶ 10.)

PENALTY

The Department requested that the Respondents' license be suspended for a period of 15 days, arguing that the mitigating and aggravating factors offset each other. In the Department's view, despite the Respondents' 11½ years of discipline-free operation, the Respondents failed to properly train or supervise Sergio Ramirez, a new employee, which led to the violation at issue. The Respondents argued that a 10-day suspension, all stayed, was appropriate based on their lengthy discipline-free history and their extensive training program.

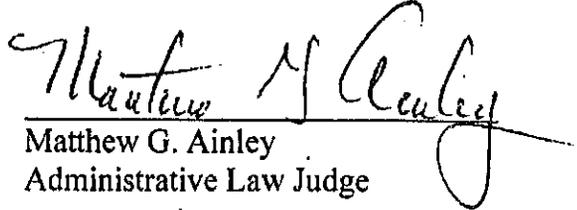
The Respondent's discipline-free history certainly warrants mitigation. With respect to the Respondents' training program, it is neither as bad as the Department alleges nor as good as the Respondents believe. It borders on axiomatic that new employees in any field will typically make more mistakes than experienced employees. The mere fact that Ramirez, a new employee, sold an alcoholic beverage to a minor, does not warrant aggravation. On the other hand, his action in hitting the Visual ID OK button when faced with a person who clearly was not over the age of 40—rather than asking for ID—indicates that the training not entirely effective in this case. In short, no mitigation nor aggravation is warranted based on the training program. The penalty recommended herein complies with rule 144.

² All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

ORDER

The Respondents' off-sale beer and wine license is hereby suspended for a period of 5 days.

Dated: November 9, 2017


Matthew G. Ainley
Administrative Law Judge

<input type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____

By: _____
Date: _____