

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

AB-9184

File: 20-469682 Reg: 10073911

7-ELEVEN, INC., and MOIZ ALI, dba 7-Eleven Store 2173-18892C
22601 Hawthorne Blvd., Torrance, CA 90505-2510,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: May 31, 2012
Los Angeles, CA

ISSUED JUNE 15, 2012

7-Eleven, Inc., and Moiz Ali, doing business as 7-Eleven Store 2173-18892C (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk having sold a bottle of merlot wine between the closing hours of 2:00 a.m. to 6:00 a.m., a violation of Business and Professions Code section 25631.

Appearances on appeal include appellants 7-Eleven, Inc., and Moiz Ali, appearing through their counsel, Ralph Barat Saltsman and Autumn M. Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

¹The decision of the Department, dated August 2, 2011, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on September 26, 2008. In December 2010 the Department instituted an accusation against appellants charging that, at 5:40 a.m. on July 2, 2010, appellants' clerk, Gelito Pajarillaga, sold a bottle of merlot wine to Department investigator Victoria Brown, in violation of Business and Professions Code section 25631. Section 25631 provides, in pertinent part:

Any on- or off-sale licensee, or agent or employee of that licensee, who sells, gives, or delivers to any persons any alcoholic beverage or any person who knowingly purchases any alcoholic beverage between the hours of 2 o'clock a.m. and 6 o'clock a.m. of the same day, is guilty of a misdemeanor.

At the administrative hearing held on April 28, 2011, documentary evidence was received and testimony concerning the violation charged was presented. The evidence established that the clerk sold a 750 ml. bottle of Tisdale Merlot wine to the Department investigator at 5:40 a.m.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and imposed the suspension from which this timely appeal has been taken.

DISCUSSION

Appellants contend that the administrative law judge (ALJ) abused his discretion by issuing a penalty pursuant to an underground regulation. Appellants do not dispute that the sale had occurred during the time period sales of alcohol are prohibited, but argue the clerk's cooperation in the investigation (furnishing the investigator a receipt for the transaction) and the two years of discipline-free operation warranted a mitigated penalty.

Rejecting appellant's plea for a mitigated penalty, the ALJ stated: "Two years [of discipline-free operation] is a fairly short period and does not warrant any mitigation. The penalty recommended herein [by the Department] complies with rule 144."

If we understand appellants' argument, it goes like this: Under rule 144, mitigating factors include length of operation without prior discipline and cooperation by the licensee in the investigation. But the rule does not provide that the duration of violation-free licensure must exceed a certain minimum, or that a particular type or degree of cooperation is required, before the proposed penalty may be mitigated. Therefore, according to appellants, the ALJ's refusal to mitigate the penalty here must have been due to an underground regulation dictating that mitigation "applies to *some* period of violation-free licensure, but not a two-year period, and applies to *some* type of cooperation, but not the type of cooperation that provides the Department with relevant and admissible documentary evidence." (App. Br. at p. 7.)

Government Code section 11342.600 states:

"Regulation" means every rule, regulation, order or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it or to govern its procedure.

There are two principal characteristics which identify a regulation subject to the Administrative Procedure Act. The agency must intend its rule to apply generally, rather than in a specific case, and the rule must implement, interpret or make specific the law enforced by the agency or govern the agency's procedure. (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571 [59 Cal.Rptr.2d 186].) And "interpretations that arise in the course of case-specific adjudication are not regulations, though they may be persuasive as precedents in similar subsequent cases." (*Ibid.*)

Rule 144 states:

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 [*sic*] 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.* [Emphasis supplied.]

The italicized language reflects the reality that facts in aggravation or mitigation do not fall in sharply defined or predictable patterns and the impossibility of establishing a rigid rule fitting all cases. The flexibility offered by rule 144 permits the fine-tuning of a standard penalty authorized by rule 144. Without belaboring the point, we think the ALJ's action was well within the power authorized by rule 144. His remark clearly had application solely to the case before him, based on the particular facts of the case. We cannot say that the penalty imposed was unreasonable or the product of an underground regulation.

ORDER

The decision of the Department is affirmed.²

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, 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.*