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

AB-9485
File: 20-336259 Reg: 14080168

7-ELEVEN, INC., MAHENDRA SINGH, and SUSHIL L. SINGH,
dba 7-Eleven Store 2232-14191F
1988 167th Avenue, San Leandro, CA 94578,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: July 9, 2015
San Francisco, CA

ISSUED JULY 31, 2015
AMENDED AUGUST 5, 2015

Appearances by counsel:

Jennifer Oden of the law firm of Solomon Saltsman & Jamieson for appellants 7-Eleven, Inc., Mahendra Singh, and Sushil L. Singh, dba 7-Eleven Store 2232-14191F.

Sean Klein for respondent Department of Alcoholic Beverage Control.

Opinion:

This appeal is from a decision of the Department of Alcoholic Beverage Control[1] suspending appellants' license for 25 days because their clerk sold an alcoholic beverage to a police minor decoy in violation of Business and Professions Code section 25658, subdivision (a).

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[1]The decision of the Department, dated December 4, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on November 18, 1997. On March 19, 2014, the Department filed an accusation against appellants charging that, on January 2, 2014, appellants' clerk, Charles Smith (the clerk), sold an alcoholic beverage to eighteen-year-old Rosemary Guerrero.[2] Although not noted in the accusation, Guerrero was working as a minor decoy for the Alameda County Sheriff's Department (ACSD) at the time.

At the administrative hearing held on October 9, 2014, documentary evidence was received and testimony concerning the sale was presented by Guerrero (the decoy), by the clerk, and by appellant and co-licensee Mahendra Singh.

Testimony established that on the date of the operation, the decoy entered the licensed premises and proceeded to the refrigerators. (RT at p. 10.) She picked up a six-pack of Bud Light beer and took it toward the line where there was one customer waiting ahead of her. (RT at p. 11.) When it was her turn to be served, the decoy placed the beer on the sales counter, and the clerk rang up the sale. (*Ibid.*)

The decoy testified that the clerk did not ask the decoy her age, nor did he ask to see proof of majority. (RT at pp. 11-12.) According to the clerk, however, he *did* ask the decoy if she was 21, and she responded nonverbally by moving her head up and down. (RT at p. 43.) Regardless, once the transaction was complete, the decoy took her change and the beer and exited the licensed premises where she met up with ACSD deputies. (RT at p. 11.)

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[2]Following the subject minor decoy operation but before the hearing, Guerrero's last name was changed to Montoya. However, because she was known as Guerrero on the date of the minor decoy operation, we will refer to her by that name or as "the decoy" throughout this decision.

The decoy then reentered the licensed premises with three ACSD deputies. While standing on the customer side of the sales counter and approximately three feet from the clerk, one of the deputies asked the decoy to identify the clerk who had sold her the beer. The decoy pointed to the clerk and stated "He was the one who did it," or words to that effect. The clerk was looking at the decoy and the deputy during the identification, and replied that he had to call his boss, which he did. The clerk was then cited and a photograph was taken of him and the decoy. (Exhibit 3.)

Singh testified that appellants provide training to their employees regarding the laws concerning the sale of alcoholic beverages before the employees are hired and then once per year thereafter. Appellants also employ "mystery shoppers" to determine whether their employees are checking for proof of majority from young-looking customers attempting to purchase alcohol. Finally, Singh testified that appellants suspended the clerk for five days for his sale of beer to the decoy.

The Department's decision determined that the violation charged was proved and no defense was established. Because appellants had been disciplined for violating section 25658(a) approximately sixteen months earlier and received a 10-day, all-stayed suspension, the administrative law judge (ALJ) recommended, and the Department imposed, an aggravated penalty of a 25-day suspension for the instant violation.

Appellants contend: (1) the ALJ abused his discretion in rejecting the clerk's testimony in favor of the decoy's conflicting testimony; (2) the Department did not proceed in the manner required by law in omitting consideration of key evidence

supporting appellants' rule 141(b)(5)[3] defense; and (3) the ALJ abused his discretion by giving improper weight to appellants' mitigating evidence.

DISCUSSION

I

Appellants argue that the ALJ abused his discretion in rejecting the clerk's testimony in favor of the decoy's conflicting testimony. They take issue with the fact that, "[i]n the Proposed Decision, the ALJ chose [the decoy's] testimony over that of [the clerk] and then made factual findings based exclusively on [the decoy's] testimony and determined that the operation complied with Rule 141(b)(4)." (App.Br. at p. 6.) Appellants claim that, in so doing, the ALJ omitted consideration of certain elements of Singh's testimony that corroborated the clerk's story, and also ignored the fact that the decoy visited over 20 locations on the evening in question and therefore could have easily been confused about what exactly transpired at each location. (*Id.* at pp. 6-8.) On account of these purported omissions, appellants contend that the ALJ's determination concerning appellants' rule 141(b)(4)[4] defense is not supported by substantial evidence. (*Id*. at p. 8.)

This Board is bound by the factual findings in the Department's decision if they are supported by substantial evidence. The standard of review is as follows:

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn

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[3]References to rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

[4]Rule 141(b)(4) dictates: "A decoy shall answer truthfully any questions about his or her age."

> the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.]

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; see also *Kirby v. Alcoholic Bev. Control Appeals Bd.* (1968) 261 Cal.App.2d 119, 122 [67 Cal.Rptr. 628] ["In considering the sufficiency of the evidence issue the court is governed by the substantial evidence rule[;] any conflict in the evidence is resolved in favor of the decision; and every reasonably deducible inference in support thereof will be indulged."].)

When an appellant charges that a Department decision is not supported by substantial evidence, the Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].). Substantial evidence is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Ct.* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) Finally, it is a fundamental precept of appellate review that it is the province of the administrative law judge, as trier of fact, to make determinations as to witness credibility and to resolve any conflicts in the testimony. (*Lorimore v. State Personnel Bd.* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640].)

In this case, the decoy's testimony regarding the sales transaction proceeded as follows:

[MR. KLEIN, COUNSEL FOR THE DEPARTMENT:]

Q. And what did you do once you got to the counter?

[THE DECOY:] I set the six-pack onto the counter.

Q. And what happened after that?

A. The clerk rang me up.

Q. Did you have any conversation or discussion with the clerk?

A. He asked me a few questions.

Q. What did he ask?

A. He said I was pretty, and then he asked me my name.

Q. Did he ask you anything else?

A. If I needed a bag.

Q. Anything else?

A. That was it.

Q. Speak up over there. So once he — when he rang you up, do you recall if he — did he ask you for your ID?

A. No.

(RT at pp. 11-12.) The clerk, on the other hand, remembered the events differently:

[MS. CARR, COUNSEL FOR APPELLANTS:]

Q. At the time [the decoy] came into the location, do you recall if she set the beer on the counter?

[THE CLERK:] A. Yes.

Q. And at that point, what did you do?

A. I asked her if she had an ID.

Q. And did she respond in any way?

A. No, she didn't.

Q. No verbal response?

A. No verbal response.

Q. Any nonverbal response?

A. No.

Q. Okay. Did you then again ask for an ID?

A. Yes, because right after I asked her did she have an ID, I had got sidetracked because there was some stuff happening in the store, people was [*sic*] trying to steal stuff and stuff like that. So when I came back to her, I asked her was she 21.

[¶ . . . ¶]

Q. So when you mentioned that you got sidetracked, did you leave the cashier location?

A. No, I did not.

Q. Did you — approximately how long did you stop the transaction with the decoy?

A. It was like maybe three to four seconds. It wasn't that long.

Q. And when you then became focused on the transaction again, what did you do?

A. I asked her, was she 21.

Q. And you asked, "Are you 21"?

A. Yes.

Q. And did she verbally respond?

A. No, she did not.

Q. Did she respond nonverbally?

A. She respond [*sic*] nonverbally with a head motion.

Q. And could you show us the head motion she made?

A. It was an up-and-down motion.

Q. And what did you interpret that up-and-down motion to mean?

A. As a "yes."

Q. So it was more like a head nod?

A. Yes.

Q. Besides asking her for her identification and then later asking if she was 21, did you have any other conversation with her?

A. No, I didn't.

Q. Do you remember if you said anything to her regarding her appearance?

A. No, I didn't.

Q. Do you remember if you asked her her name?

A. No, I didn't ask her her name.

(RT at pp. 41-44.) According to appellants, the clerk's testimony was corroborated by Singh's:

[MS. CARR:]

Q. And did you discipline [the clerk] in any way for —

[SINGH:] A. Yes, I did in fact. I suspended him for a week.

Q. And why did you suspend him?

A. Because he did not swipe the ID in the register, which you are supposed to do. And that was a violation of company rules. The reason he was not terminated and was only suspended because he showed me the citation and he said he was attending his criminal case, and he told me that he knew the customer before she was in line, she did not have ID, and he had asked her if she was 21.

So I told [the clerk] that, you know, "If you lose your case, you will be terminated like all my other employees have been."

(RT at p. 56.)

During cross examination of the clerk, however, it was revealed that his memory concerning the sales transaction was less than perfect:

> [MR. KLEIN:]
>
> Q. Following this incident, the January 2nd sale, did you write up any sort of report or explanation to your manager?
>
> [THE CLERK:] A. I wrote it in the log book, because I couldn't get in touch with him.
>
> Q. Did you make a written statement?
>
> A. Yes, I did.
>
> Q. Okay. And in that written statement, did you tell your manager that you did not ask the decoy for ID?
>
> A. That I didn't ask for ID?
>
> Q. Yes.
>
> A. I don't think so.
>
> Q. Okay. Did you, in your written statement, say that you normally don't ask for ID from people who come in regularly?
>
> A. No, I didn't.
>
> [Exhibit 4 is marked for identification]
>
> BY MR. KLEIN:
>
> Q. Okay. I'm going to show you what we marked as Exhibit 4. Is that a copy of the statement that you wrote and gave to your manager?
>
> [THE CLERK:] A. Yes, it is.
>
> Q. And that's your signature at the bottom?
>
> A. Yes, it is.
>
> Q. And in that statement you say that you did not ask her for ID?
>
> A. Yeah, I did not ask for ID because she was somebody that I thought that came in regularly.

Q. And you also don't mention an attempted theft in the store during the transaction in that statement; right?

A. No I didn't.

(RT at pp. 49-50.)

On redirect examination, the clerk confirmed that, contrary to his initial testimony on direct — and, apparently, contrary to what he previously told Singh — he did *not* ask the decoy for identification during the transaction. He did, however, remain adamant that asked the decoy if she was 21:

[MS. CARR]

Q. Okay. So just to be clear then, you did not ask for ID?

A. No.

Q. Is it store policy to ask for identification?

A. Yeah.

Q. So did you, in fact, violate store policy?

A. Yes, I did.

Q. Did you ask her any questions related to her age?

A. I asked her was she 21.

Q. And earlier you testified that when you asked that question, she nodded?

A. Yes.

Q. To what you took as a "yes" nod?

A. Yes.

(RT at pp. 51-52.)

In light of the testimony from the various witnesses, the ALJ assessed credibility

and considered appellants' rule 141(b)(4) defense:

> Respondents' clerk testified that before selling the beer to the decoy, he asked the decoy whether she was twenty-one years old, and that she nodded. This testimony is given no weight for the following reasons: 1) the decoy testified credibly that the clerk did not ask her any questions regarding her age, 2) it does not make sense for a clerk to ask a youthful-appearing customer whether she is twenty-one years old, receive what he thinks is an affirmative answer, and then simply accept the answer without asking to see proof of the customer's age, and 3) the clerk testified falsely on direct examination that he had asked to see the decoy's identification, only to admit on cross-examination that he did in fact not do so. Accordingly, Respondents did not meet their burden of proving a violation of Rule 141(b)(4).

(Determination of Issues, ¶ V.)

Appellants disagree with the ALJ's assessment and argue that substantial, corroborated evidence weighs against the decoy's version of events. We are not convinced. What appellants conveniently fail to discuss in their brief is that the clerk's testimony on direct examination concerning whether he asked the decoy for identification or indicated that he did not ask regular customers for their ID was obviously self-serving and wholly contradicted by his testimony on cross examination and redirect. Moreover, Singh's testimony can hardly be deemed "corroborating" because it was based exclusively on what the clerk allegedly told him, which was also directly contradicted by the clerk's written statement on the evening in question. As such, it was perfectly reasonable for the ALJ to assign little to no credibility to either witness's testimony, and to make factual findings consistent with the decoy's version of events.

Finally, appellants cite Government Code section 11425.50(b)[5] and *California*

[5]Section 11425.50, subdivision (b), states, in pertinent part:

(continued . . .)

Youth Authority v. State Personnel Board (*CYA*) (2002) 104 Cal.App.4th 575, 579 [128 Cal.Rptr.2d 514] and contend that, "when the ALJ does not base his credibility determination on his observations of the witness' demeanor, manner, or attitude as required by Section 11425.50(b), the Appeals Board is not bound to be [*sic*] give great weight to the ALJ's determination based thereon." (App.Br. at p. 7, citation omitted.)

Appellants' contention fails on multiple levels. First, the ALJ's reference to the clerk's false testimony on direct examination concerning his request for identification from the decoy is arguably "specific evidence of the observed demeanor, manner, or attitude of the witness" which would mandate that this Board give "great weight" to the ALJ's credibility determination. (See Gov. Code § 11425.50, subd. (b).)

Moreover, appellants' reliance on *CYA*, *supra*, is misplaced. In that case, the court determined that section 11425.50 did not "come into play" because the ALJ did not identify the witnesses' demeanor, manner, or attitude that supported his credibility determinations; therefore, the court said, it would not give special weight to those determinations when considering whether substantial evidence supported the decision. Since neither party in *CYA* had argued that the decision was defective due to the ALJ's failure to identify the specified factors, the court declined to express a view on the matter. (*CYA*, *supra*, 104 Cal.App.4th at p. 596, fn. 11.)

This Board, however, has addressed and rejected the argument that an ALJ's

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[5](. . . continued)
If the factual basis for the decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on judicial review the court shall give great weight to the determination to the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it.

failure to articulate the factors referenced in section 11425.50(b) establishes that the ALJ's witness credibility determinations should be given little to no weight:

> Section 11425.50 is silent as to the consequences which flow from an ALJ's failure to articulate the factors mentioned.[fn.] However, we do not think that any failure to comply with the statute means the decision must be reversed. It is more reasonable to construe this provision as saying simply that a reviewing court may give greater weight to a credibility determination in which the ALJ discussed the evidence upon which he or she based the determination. We do not think it means the determination is entitled to no weight at all.

(*7-Eleven, Inc./Singh* (2002) AB-7792, at pp. 3-4; see also *7-Eleven, Inc./Janizeh* (2005) AB-8306; *Chuenmeersi* (2002) AB-7856.) Nothing in the instant case merits a reconsideration of this position. The ALJ had ample justification for finding the decoy's version of events to be more convincing than the clerk's, particularly since the clerk was shown to have testified falsely on direct examination. In sum, the ALJ's credibility determinations and findings of fact made thereon are supported by substantial evidence, and appellants have given the Board no valid reason to hold otherwise.

II

Appellants contend that the Department did not proceed in the manner required by law in omitting consideration of key evidence supporting their rule 141(b)(5) defense.

Rule 141(b)(5) states:

> Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

The rule provides an affirmative defense. The burden is therefore on the appellants to show non-compliance. (See, e.g., *7-Eleven, Inc./Dhillon* (2015) AB-9432, at p. 4.)

As noted by appellants in their brief, in *Chun* (1999) AB-7287, this Board

observed:

> The phrase "face to face" means that the two, the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

(*Id.* at p. 5.)

In this case, the decoy testified as follows regarding the identification:

> [BY MR. KLEIN:]
>
> Q. Did you go in with the deputies?
>
> [THE DECOY:] A. Yes.
>
> Q. Okay. And what did you — what did you do once you went in with the deputies?
>
> A. I don't recall which deputy it was, but he asked me to point out who the clerk was that sold me the alcohol.
>
> Q. And where was the clerk when this happened?
>
> A. Behind the counter.
>
> Q. And where were you?
>
> A. Right in front of the counter.
>
> Q. And what was the clerk doing at this point?
>
> A. He was finishing ringing up with another customer.
>
> Q. At what point was he finishing ringing up?
>
> So you walked in, you said, and what was the clerk doing when you walked in?
>
> A. He was ringing up another customer.
>
> Q. And then you said that the deputy asked you to identify the person that sold you the alcohol?
>
> A. Yes.

> Q. And what was the clerk doing at that point?
>
> A. He made a comment, and he wanted to call his boss.
>
> Q. Okay. That was after you pointed him out?
>
> A. Yes.
>
> Q. Okay. What was he doing at the point — at that moment when you pointed him out?
>
> A. He looked at me and he looked at the other deputies.
>
> Q. Okay. And so what happened after he made the comment about calling his boss?
>
> A. He took his phone and he started to dial and the deputies told him to step aside.

(RT at pp. 12-13.) The decoy subsequently testified during cross examination and examination by the ALJ, respectively, that she and the deputies were on the customers' side of the counter and approximately three feet from the clerk when the identification took place. (See RT at pp. 25, 35.)

Based on the decoy's testimony, the ALJ made the following findings of fact concerning the identification:

> While standing on the customers' side of the counter, one of the deputies asked the decoy to identify the clerk who sold the beer to her. The decoy, standing approximately three feet from [the clerk], identified him as the seller by pointing at him and saying, "He was the one who did it," or words to that effect. During the identification, [the clerk] was looking at the decoy and the deputy. [The clerk] replied that he had to call his boss, and did so.

(Findings of Fact, ¶ V.) The ALJ ultimately concluded that appellants did not meet their burden of proving a violation of rule 141(b)(5). (See Determination of Issues, ¶ IV.)

Appellants take issue with the fact that the ALJ made findings based exclusively on the decoy's testimony, and apparently disregarded the fact that the clerk "took the

stand and emphatically testified that he never saw [the decoy] point to him or verbally state he was the seller." (App.Br. at p. 10, citing RT at p. 46.) Appellants' claim, however, ignores certain critical aspects of the clerk's testimony. Specifically, the clerk was proven to have testified falsely regarding at least two matters concerning the decoy operation during direct examination. As discussed above, see Section I, *supra*, these instances of false or mistaken testimony provided more than enough grounds for the ALJ to discredit the clerk's version of the events altogether, and to find the clerk to be an unreliable witness. Because the only "evidence" offered by appellants to support their rule 141(b)(5) defense was the clerk's testimony, which had already in some respects been shown to be contradictory and inconsistent, it was, to say the least, not convincing. The ALJ's decision to make findings based on the decoy's testimony was therefore neither an abuse of discretion nor unreasonable, and was well within his province as the trier of fact. (See *Lorimore*, *supra*, 232 Cal.App.2d at p. 189; see also 31A Cal.Jur.3d (2010) Evidence, § 824 ["The weight to be given impeaching evidence of inconsistent statements is a matter peculiarly within the province of the trier of fact."], citation omitted.)

According to the decoy's testimony — which was not contradicted by any *credible* evidence — the clerk was aware, or reasonably ought to have been aware, that he was being identified as the person who sold alcoholic beverages to the minor decoy. As such, the Department's decision is supported by substantial evidence, and appellants failed to establish their defense under rule 141(b)(5).

III

Appellants contend the ALJ abused his discretion in refusing to recognize

appellants' mitigating evidence. (App.Br. at p. 13.)

The 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]), 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].) 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 sets forth the Department's penalty guidelines and provides that higher or lower penalties from the schedule may be recommended based on the facts of individual cases where generally supported by aggravating or mitigating circumstances. (Cal. Code Regs., tit. 4, § 144.) Among the aggravating factors listed in rule 144 is the licensee's prior disciplinary history, and the mitigating factors include length of licensure without prior discipline, positive actions taken by the licensee to correct the problem, and documented training of the licensee and employees. (*Ibid.*)

Importantly, 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.

In his proposed decision, the ALJ made the following findings of fact concerning the efforts appellants have taken to prevent such violations from occurring:

> Respondents provide training to their employees before they are hired, and once a year thereafter, regarding the laws pertaining to the sale of alcoholic beverages. They also employ "mystery shoppers" to determine whether their employees ask for proof of majority from youthful-appearing customers attempting to purchase alcoholic beverages. And, Respondents suspended [the clerk] for five days for his sale of the beer to the decoy.

(Findings of Fact, ¶ XI). Despite appellants' efforts, however, the ALJ determined that an aggravated penalty was warranted in this case:

> Respondents' efforts to avoid the sale of alcoholic beverages to underage customers, as listed in Paragraph XI of the Findings of Fact, are actions which a prudent licensee would take, and do not constitute legal cause for mitigation of Respondents' penalty. It should be noted that Respondents violated Business and Professions Code Section 25658(a) some sixteen months earlier, for which they received the lenient penalty of suspension of their license for ten days, with all ten days stayed.

(Determination of Issues, ¶ VI.) Hence, the ALJ recommended a 25-day suspension.

Appellants disagree with the ALJ's penalty determination and claim that it is "unsupported in law or fact because the licensees in fact showed evidence of *every* type of mitigating evidence specifically enumerated and *legally* recognized by Rule 144." (App.Br. at p. 14, emphasis in original.)

While appellants are correct that the evidence they presented *may* qualify them

for a mitigated penalty, they ignore the fact that the penalty guidelines are nothing more than what they purport to be — guidelines. The language of rule 144 is discretionary, not mandatory, and clearly anticipates that penalties will be assessed by the Department on a case-by-case basis. There is nothing in the rule that obliges the Department to impose a mitigated penalty simply because one or even all of the listed factors are satisfied in any particular case. Moreover, as noted by the ALJ, this was appellants' second violation of section 25658 within approximately sixteen months. The Penalty Schedule for rule 144 recommends a 25-day suspension for a second violation of section 25658 within 36 months, thus the penalty here falls within the proposed limits. All in all, nothing in this case suggests that the penalty imposed was the result of an abuse of discretion.

ORDER

The decision of the Department is affirmed.[6]

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

[6]This final decision 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 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.