

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

AB-9755

File: 20-569854; Reg: 18086581

7-ELEVEN, INC. and DEAN-SON, INC.,
dba 7-Eleven Store #21006E
1301 Monterey Street
San Luis Obispo, CA 93401,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: October 3, 2019
Los Angeles, CA

ISSUED OCTOBER 15, 2019

Appearances: *Appellants:* Adam N. Koslin, of Solomon, Saltsman & Jamieson, as counsel for 7-Eleven, Inc. and Dean-Son, Inc.,

Respondent: Lisa Wong, as counsel for the Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and Dean-Son, Inc., doing business as 7-Eleven Store #21006E (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 15 days because their clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code section 25658(a).

¹The decision of the Department, dated October 10, 2018, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 7, 2016.

Appellants have no record of prior disciplinary action.

On February 28, 2018, the Department instituted an accusation against appellants charging that, on December 12, 2017, appellants' clerk Kristian De Leon (the clerk), sold an alcoholic beverage to 19-year-old police minor decoy Emily Schube (the decoy). Although not noted in the accusation, the decoy was working for the San Luis Obispo Police Department at the time.

At the administrative hearing held on June 12, 2018, documentary evidence was received, and testimony concerning the violation charged was presented by the decoy, San Luis Obispo Police Officer Joseph Scott Hurni, and Department Agent Lori Kohlman. Muhammad Ayyaz, owner of co-licensee Dean-Son, Inc., testified on appellants' behalf.

Testimony established that on December 12, 2017, Officer Hurni entered the licensed premises and went to the back. The decoy subsequently entered and walked toward the alcoholic beverage coolers, selected a tall can of Bud Light beer, and took it to the counter. The clerk rang up the beer without asking to see ID nor inquiring into the decoy's age. After the decoy paid, the clerk gave her some change, and she exited the licensed premises.

Outside, the decoy walked to a vehicle where officers were waiting. She re-entered the licensed premises with the officers and went to the counter. Officer Hurni also walked to the counter from the back of the store and asked the decoy to identify the

person who sold her the beer. The decoy identified the clerk. A photograph of the two of them was taken (exh. 2) and the clerk was cited.

After the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established. The Department also ordered that appellants' license be suspended for 15 days. Appellants filed a timely appeal contending that the 15-day suspension is excessive.

DISCUSSION

Appellants contend their 15-day suspension is excessive. (AOB, at pp. 6-10.) Specifically, appellants argue that the administrative law judge (ALJ) (and by extension the Department) "failed to consider significant mitigative evidence, mischaracterized other pieces of mitigative evidence, and failed to properly constitute their findings." (*Id.* at p. 8.) The impetus being that, had the ALJ and Department not "departed from the requirements of Rule 144," appellants would have received a lesser penalty. (*Ibid.*)

The Board 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 the area of its discretion.'

(*Harris v. Alcoholic Beverage Control Appeals Board* (1965) 62 Cal. 2d 589, 594 [400 P.2d 745].)

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, emphasis added.)

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.

(*Ibid.*)

Here, appellants first argue that it was error for the ALJ and Department to "refus[e] to consider several pieces of mitigating evidence [such as the] store's unblemished success rate in secret shopper alcohol and tobacco purchases, as well as the sting operations at his store post-dating the date of the alleged violations during which his clerks refused to sell age-restricted products to minors." (AOB, at p. 8.)

However, there is no support in the record for appellants' contention. In fact, the record shows that the ALJ did consider appellants' mitigation evidence, writing: "[a]lthough the Respondents have taken some steps to prevent the sale of alcohol to minors, their training and procedures were clearly ineffective since the clerk circumvented all of them and entered his mother's date of birth in order to complete the sale." (Decision, at p. 5.) There is no abuse of discretion simply because appellants disagree with the weight the ALJ afforded to their evidence.

Likewise, there is no support in the record that the ALJ misstated evidence or failed to properly constitute their findings. In his Findings of Fact, the ALJ wrote:

8. The officers asked De Leon why he sold alcohol to a minor. De Leon made a series of excuses. When asked how he completed the sale, De Leon indicated that he had entered his mother's date of birth.

9. Muhammad Ayyaz, owner of co-licensee Dean Son, Inc. was in the back room when the sale took place. After the officers left, Ayyaz spoke to De Leon, who indicated that Ofcr. Hurni was in a blind spot in the back of the Licensed Premises and that he kept looking in that direction to see if the officer needed any help. He further indicated that he was in a hurry because he was nervous.

10. After the sale, Ayyaz added new signs inside the Licensed Premises, both on the coolers (exhibit A) and near the register (a "born before' sign). He also re-trained his employees. (Exhibit B.) [...] Ayyaz removed the "visual ID" button from the register. The Licensed Premises uses a secret shopper program to ensure that employees are complying with the Licensed Premises' policies. (Exhibit C.)

(Findings of Fact, ¶¶ 8-10.) Based on these findings, the ALJ concluded:

7. [T]here is no direct evidence that Ofcr. Hurni's actions distracted De Leon or made him nervous. De Leon did not testify and he made no such claim to the officers immediately after the sale. The only evidence presented by the Respondents in support of their claim is De Leon's hearsay statement to Muhammad Ayyaz, his employer.

8. Finally, the undersigned has reviewed the video submitted by the Respondents (exhibit D) showing Ofcr. Hurni's actions inside the Licensed Premises. Ofcr. Hurni does not behave suspiciously or threateningly. Rather, he simply mills around looking at the displays. For all of these reasons, the Respondents' unfairness claim is without merit.

(Conclusions of Law, ¶¶ 7-8.)

As the Board has said many times, the extent to which the Department considers mitigating or aggravating factors is a matter entirely within its discretion — pursuant to rule 144 — and the Board may not interfere with that discretion absent a clear showing of abuse. The record shows that the ALJ considered appellants' evidence of mitigation, as it was offered at the administrative hearing. The fact that appellants' evidence was not enough to shorten the standard 15-day suspension does not constitute an abuse of discretion, nor render the penalty unreasonable. The Board sees no error.

ORDER

The decision of the Department is affirmed.²

SUSAN A. BONILLA, CHAIR
MEGAN McGUINNESS, 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.

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. & DEAN-SON, INC.
7-ELEVEN #21006E
1301 MONTEREY STREET
SAN LUIS OBISPO, CA 93401

OFF-SALE BEER AND WINE - LICENSE

Respondent(s)/Licensee(s)
Under the Alcoholic Beverage Control Act

SAN LUIS OBISPO DISTRICT OFFICE

File: 20-569854

Reg: 18086581

CERTIFICATE OF DECISION

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on September 20, 2018. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814.

On or after November 20, 2018, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: October 10, 2018



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

7-Eleven Inc. & Dean-Son, Inc.
dba 7-Eleven #21006E
1301 Monterey St.
San Luis Obispo, California 93401

Respondents

}e File: 20-569854
} Reg.: 18086581
} License Type: 20
} Word Count: 12,000
} Reporter:
}e Pamela Cox
} Kennedy Court Reporters

Off-Sale Beer and Wine License

PROPOSED DECISION

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at San Luis Obispo, California, on June 12, 2018.

Jonathan V. Nguyen, Attorney, represented the Department of Alcoholic Beverage Control.

Donna J. Hooper, attorney-at-law, represented respondents 7-Eleven Inc. & Dean-Son, Inc. Muhammad Ayyaz, President of Dean-Son, Inc., was present.

The Department seeks to discipline the Respondents' license on the grounds that, on or about December 12, 2017, the Respondents, through their agent or employee, sold, furnished, or gave alcoholic beverages to Emily Schube, 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 June 12, 2018.

FINDINGS OF FACT

1. The Department filed the accusation on February 28, 2018.

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 July 7, 2016 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondents' license.
4. Emily Schube was born on December 4, 1998. She served as a minor decoy during an operation conducted by the San Luis Obispo Police Department on December 12, 2017. On that date she was 19 years old.
5. Schube appeared and testified at the hearing. On December 12, 2017, she was 5'4" tall and weighed 120 pounds. She wore a t-shirt with a purple sweatshirt over it, leggings, and Vans. Her hair was long, straight, and parted in the middle. She wore mascara and a little eyeliner. (Exhibits 2, 3, & 4.) Her appearance at the hearing was the same.
6. On December 12, 2017, Ofcr. Joseph Hurni entered the Licensed Premises and went to the back of the Licensed Premises. Schube subsequently entered and walked toward the alcoholic beverage coolers. Schube selected a tall can of Bud Light beer, which she took to the counter. The clerk, Kristian De Leon, rang up the beer without asking to see ID nor inquiring into Schube's age. Schube paid, De Leon gave her some change, then she exited. While Schube was inside the Licensed Premises, Ofcr. Hurni kept an eye on her while looking at some wine and the magazine rack.
7. Schube walked to the vehicle where an officer was waiting for her. She re-entered the Licensed Premises with various officers. Ofcr. Hurni walked to the counter and met up with Schube and the other officers. De Leon was still on the employee side of the counter. Ofcr. Hurni asked Schube to identify the person who sold her the beer. Across the counter, at a distance of approximately six feet, Schube identified De Leon. A photo of the two of them was taken (exhibit 2), after which De Leon was cited.
8. The officers asked De Leon why he sold alcohol to a minor. De Leon made a series of excuses. When asked how he completed the sale, De Leon indicated that he had entered his mother's date of birth.
9. Muhammad Ayyaz, owner of co-licensee Dean Son, Inc. was in the back room when the sale took place. After the officers left, Ayyaz spoke to De Leon, who indicated that Ofcr. Hurni was in a blind spot in the back of the Licensed Premises and that he kept looking in that direction to see if the officer needed any help. He further indicated that he was in a hurry because he was nervous.
10. After the sale, Ayyaz added new signs inside the Licensed Premises, both on the coolers (exhibit A) and near the register (a "born before" sign). He also re-trained his

employees. (Exhibit B.) Employees are supposed to ask for ID from anyone who appears to be under the age of 30 and are required to scan or swipe all IDs. An employee can manually enter a date of birth if the ID cannot be scanned or swiped. Ayyaz removed the "visual ID" button from the register. The Licensed Premises uses a secret shopper program to ensure that employees are complying with the Licensed Premises' policies. (Exhibit C.)

11. Schube learned of the decoy program through her work as a receptionist at the police station. December 12, 2017 was the only time she acted as a decoy. Of the 35 locations she visited that day, the Licensed Premises was the only one which sold alcohol to her.

12. Schube appeared her age—19—at the time of the decoy operation. Based on her overall appearance, i.e., her physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in the Licensed Premises on December 12, 2017, Schube displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to De Leon.

13. 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 December 12, 2017, the Respondents' clerk, Kristian De Leon, inside the Licensed Premises, sold an alcoholic beverage to Emily Schube, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-12.)

5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rule 141(a)² and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondents argued that Ofcr. Joseph Hurni was acting suspiciously, moving about and looking at the clerk in a manner consistent with a shoplifter. This argument is rejected.

6. First and foremost, unfairness is not a separate defense under rule 141. As the court of appeal in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (Garfield Beach CVS, LLC)*³ clearly held:

"Rule 141 provides specific guidance regarding how to preserve fairness in minor decoy operations. Subdivision (b) of Rule 141 implements the goal of fairness by imposing five specific requirements for every minor decoy operation. Decoys must be under the age of 20; have the appearance of a person under 21; carry their own actual identification and present that identification upon request; truthfully answer any questions about their ages; and make face-to-face identifications of the persons who sold the alcoholic beverages. (Rule 141(b)(1)-(5).) Fairness under Rule 141 is assured by a set of five expressly defined safeguards, all of which must be fulfilled during a minor decoy operation."⁴

Elsewhere, the court of appeal makes clear that the notion of fairness does not authorize the creation of new defenses under rule 141 beyond those specified in rule 141(b).⁵

7. Second, there is no direct evidence that Ofcr. Hurni's actions distracted De Leon or made him nervous. De Leon did not testify and he made no such claim to the officers immediately after the sale. The only evidence presented by the Respondents in support of their claim is De Leon's hearsay statement to Muhammad Ayyaz, his employer.

8. Finally, the undersigned has reviewed the video submitted by the Respondents (exhibit D) showing Ofcr. Hurui's actions inside the Licensed Premises. Ofcr. Hurni does not behave suspiciously or threateningly. Rather, he simply mills around looking at the displays. For all of these reasons, the Respondents' unfairness claim is without merit.

9. The Respondents did not raise the decoy's appearance as an issue in their closing argument. The Appeals Board, in multiple cases, has indicated that ALJs should make findings about the decoy's appearance in their proposed decisions. Accordingly, the

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

³ 7 Cal. App. 5th 628, 213 Cal. Rptr. 3d 130 (2017).

⁴ *Id.* at 638, 213 Cal. Rptr. 3d at 138.

⁵ *Id.* at 640, 213 Cal. Rptr. 3d at 140.

undersigned included Finding of Fact ¶ 12 in this decision. However, since the Respondents did not raise rule 141(b)(2) during the course of the hearing, Schube's appearance is **not** at issue.

PENALTYs

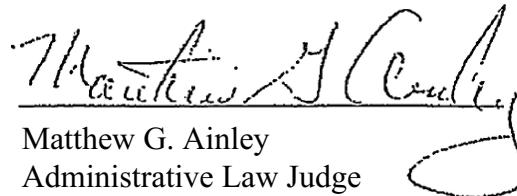
The Department requested that the Respondents' license should be suspended for a period of 15 days. The Respondents argued that, if the accusation were sustained, a 10-day suspension was appropriate based on the Respondents' training of its employees, use of signs, and removal of the "visual ID" button.

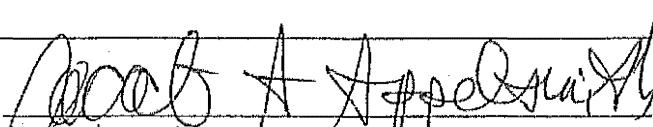
The Respondents had only been licensed for 17 months at the time of the violation. Although the Respondents have taken some steps to prevent the sale of alcohol to minors, their training and procedures were clearly ineffective since the clerk circumvented all of them and entered his mother's date of birth in order to complete the sale. The absence of any evidence to explain the clerk's actions is noteworthy. The penalty recommended herein complies with rule 144.

ORDER

The Respondents' off-sale beer and wine license is hereby suspended for a period of 15 days.

Dated: August 1, 2018


Matthew G. Ainley
Matthew G. Ainley
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: 9/20/18