

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

AB-8210

File: 20-379900 Reg: 03055151

7-ELEVEN, INC., and BALWANT SINGH dba 7-Eleven #2237-22738C
111 West Walnut Avenue, Visalia, CA 93277,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jerry Mitchell

Appeals Board Hearing: October 7, 2004
San Francisco, CA

ISSUED DECEMBER 8, 2004

7-Eleven, Inc., and Balwant Singh, doing business as 7-Eleven #2237-22738 (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 six-pack of Budweiser beer to Denise Espinoza, a 19-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Balwant Singh, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas Loehr.

PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on September 24, 2001.

¹The decision of the Department, dated November 13, 2003, is set forth in the appendix.

On June 17, 2003, the Department instituted an accusation against appellants charging the unlawful sale of an alcoholic beverage to a minor on February 19, 2003.

An administrative hearing was held on September 24, 2003. Subsequent to the hearing, the Department issued its decision which determined that the violation occurred as alleged in the accusation.

Appellants thereafter filed a timely appeal in which they raise a single issue; they assert that the penalty was imposed pursuant to an illegal underground regulation.

DISCUSSION

Appellants cite the Board's decision in *Vicary* (2003) AB-7606a, and contend that the penalty in this case was imposed pursuant to the same underground regulation the Board condemned in that case. They contend that the penalty was based upon Department guidelines which were never properly adopted as regulations pursuant to Government Code sections 11340 *et seq.* and the Department's rule-making power under Business and Professions Code section 25750.

At the close of the hearing, Department counsel recommended a 15-day penalty. The administrative law judge (ALJ) stated in his proposed decision that the recommended penalty "is reasonable and appropriate." He made no reference in the decision to the guidelines about which appellants complain, and, when the recommendation was made to him in the hearing, he stated [RT 61]: "Mr. Evans, the 15 days is a recommendation from my perspective. I'm not bound by it. Do you want to address that issue?"

Mr. Evans, counsel for appellants, responded:

Your Honor, only that it's well established, and I can call the witness to testify to it, and that's Mr. Blanchard, as to the training that 7-Eleven conducts, but I don't think that's necessary. You've heard these corporate policies many times before.

If there is any penalty it should be mitigated in this case.

Although appellants included an objection to the penalty to be recommended by the Department as one of 16 defenses in a special notice of defense filed prior to the hearing, no reference was made to this defense in the course of the hearing, and no evidence was offered in support of the contention now asserted on appeal.

There are several reasons why appellants' contention should be rejected. First, it cannot be said to have been raised in a manner that would have reasonably put the ALJ on notice that appellants intended to preserve that objection. Mr. Evans failed to respond in any meaningful way to the ALJ's invitation to address the penalty issue, other than to suggest that mitigation was appropriate.

Second, Department counsel made no reference to any penalty guidelines, nor did the ALJ. As the Board said in *Gannon* (2004) AB-8174, it cannot say with any degree of certainty that the suspension was determined by the Department's guidelines.

Third, the ALJ expressly stated that he did not feel bound by the Department's recommendation. Under appellants' approach to the issue, unless the ALJ was willing to deviate from the Department recommendation, whether or not he thought it reasonable and appropriate, he was precluded from imposing a penalty. We find this logic unpersuasive.

ORDER

The decision of the Department is affirmed.²

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

² This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.