

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

AB-9814

File: 20-215274; Reg: 18087544

7-ELEVEN, INC., CAROLYN VARNER and RAYMOND VARNER,
dba 7-Eleven Store #2173-23949
1519 South Bundy Drive,
Los Angeles, CA 90025,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: January 9, 2020
Los Angeles, CA

ISSUED JANUARY 21, 2020

Appearances: *Appellants:* David Brian Washburn, of Solomon, Saltsman & Jamieson, as counsel for 7-Eleven, Inc., Carolyn Varner and Raymond Varner,

Respondent: Alanna Ormiston, as counsel for the Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc., Carolyn Varner and Raymond Varner, doing business as 7-Eleven Store #2173-23949, appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for five days, with all five days conditionally stayed, because their clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Profession Code section 25658(a).

¹The decision of the Department, dated May 8, 2019, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1988. There is no record of prior departmental discipline against the license.

On October 2, 2018, the Department filed a single-count accusation against appellants charging that, on June 2, 2018, appellants' clerk, Claudia Hernandez (the clerk), sold an alcoholic beverage to 19-year-old Reynaldo Ramirez (the decoy). Although not noted in the accusation, the decoy was working for the Los Angeles Police Department (LAPD) at the time.

At the administrative hearing held on February 5, 2019, documentary evidence was received, and testimony concerning the sale was presented by the decoy and LAPD Officers Jeffrey Duarte and Lester Dysim. Harnek Thiara, a training consultant appellants hired after the violation, testified on appellants' behalf.

Testimony established that on June 2, 2018, the decoy entered the licensed premises, went to the alcoholic beverage section, and selected a 24-ounce can of Corona beer. He took the beer to the counter and presented it to the clerk for purchase. The clerk, who was on the phone, scanned the beer and accepted the decoy's money. After the clerk gave the decoy his change, the decoy exited the licensed premises with the beer.

Ofcr. Duarte, who watched the transaction, contacted the clerk and told her to hang up the phone. He identified himself, explained the violation, and asked her to come out from behind the counter. The decoy, who re-entered the licensed premises with another officer, identified the clerk as the person who sold him the beer. A photograph of the clerk and the decoy together was taken (exh. 4) and afterwards the clerk was cited.

On March 7, 2019, the administrative law judge (ALJ) issued his proposed decision sustaining the violation and recommending a five-day suspension, with all five days conditionally stayed. The Department adopted the proposed decision in its entirety on April 26, 2019 and issued a certificate of decision on May 8, 2019.

Appellants filed a timely appeal contending that the penalty is excessive.

DISCUSSION

Appellants contend that the Department failed to consider mitigating circumstances. (AOB, at pp. 4-7.) Specifically, appellants argue that they should have received a letter of warning, not a suspension. (*Id.* at p. 7.)

This 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].) However, 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].) An administrative agency abuses its discretion when it "exceeds the bounds of reason." (*County of Santa Cruz v. Civil Service Commission of Santa Cruz* (2009) 171 Cal.App.4th 1577, 1582 [90 Cal.Rptr.3d 394, 397].) In fact, "[i]f 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].)

In determining disciplinary action, the Department is required to consider the penalty guidelines incorporated in California Code of Regulations, title 4, section 144. The standard penalty for a first-time violation of section 25658(a) is 15 days. (Cal. Code Regs., tit. 4, § 144.) Nevertheless, rule 144 allows the Department to deviate

from the standard penalty when, “*in its sole discretion*[, it] determines that the facts of the particular case warrant such deviation — such as where facts in aggravation or mitigation exist.” (*Ibid.*, emphasis added.)

Factors in aggravation include prior disciplinary history, prior warning letters, licensee involvement, premises located in high crime area, lack of cooperation by licensee in investigation, appearance and actual age of minor, and continuing course or pattern of conduct. (Cal. Code Regs., tit. 4, § 144.) Factors in mitigation include the length of licensure at subject premises without prior discipline or problems, positive action by licensee to correct problem, documented training of licensee and employees, and cooperation by licensee in investigation. However, neither list of factors is exhaustive; the Department may use its discretion to determine whether other aggravating or mitigating circumstances exist. (*Ibid.*)

Here, appellants claim the Department “failed to properly weigh mitigating circumstances and evidence when it found that a 5-day, all-stayed penalty was warranted.” (AOB, at p. 7.) However, the record establishes that the Department considered appellants’ “discipline-free history and the substantial changes they made after the sale,” finding it constituted “substantial mitigation” and “indicates that the violation was an aberration.” (Decision, at p. 4.) Based on this mitigation evidence, the Department lowered appellants’ penalty from the standard 15-day suspension outlined in rule 144 to the 5-day all-stayed penalty in the decision. (*Ibid.*) The Board cannot say that the Department abused its discretion in weighing appellants’ evidence, nor can it re-weigh the same evidence to hold that appellants deserved an even lesser penalty than what they received.

As the Board has said many times over the years, the extent to which the Department considers mitigating or aggravating factors is a matter entirely within its discretion. Rule 144 provides a standard 15-day suspension for a section 25658(a) violation, which is far more than appellants received. The Department clearly afforded appellants with a mitigated penalty based on evidence presented at the hearing. The fact that the penalty was still not as low as appellants hoped does not make it unreasonable or an abuse of discretion. Therefore, the penalty must stand.

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., CAROLYN VARNER,
RAYMOND VARNER
7 ELEVEN #2173 23949
1519 S. BUNDY DR.
LOS ANGELES, CA 90025

OFF-SALE BEER AND WINE - LICENSE

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

CERRITOS DISTRICT OFFICE

File: 20-215274

Reg: 18087544

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 April 26, 2019. 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, 300 Capitol Mall, Suite 1245, Sacramento, CA 95814.

Sacramento, California

Dated: May 8, 2019

RECEIVED

MAY 09 2019

Alcoholic Beverage Control
Office of Legal Services



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., Carolyn Varner & Raymond Varner
dba 7-Eleven #2173-23949
1519 S. Bundy Dr.
Los Angeles, California 90025

Respondents

} File: 20-215274

} Reg.: 18087544

} License Type: 20

} Word Count: 11,000

} Reporter:

} Tracy Terkeurst

} California Reporting

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 Los Angeles, California, on February 5, 2019.

Alanna K. Ormiston, Attorney, represented the Department of Alcoholic Beverage Control.

Brian Washburn, attorney-at-law, represented respondents 7-Eleven Inc., Carolyn Varner, and Raymond Varner.

The Department seeks to discipline the Respondents' license on the grounds that, on or about June 2, 2018, the Respondents, through their agent or employee, sold, furnished, or gave alcoholic beverages to Reynaldo Ramirez, 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 February 5, 2019.

FINDINGS OF FACT

1. The Department filed the accusation on October 2, 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 1, 1988 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondents' license.
4. Reynaldo Ramirez was born on January 5, 1999. On June 2, 2018, he served as a minor decoy during an operation conducted by the Los Angeles Police Department. On that date he was 19 years old.
5. Ramirez appeared and testified at the hearing. On June 2, 2018, he was 5'8" tall and weighed 210 pounds. He wore a long-sleeve black shirt, black pants, and black and white shoes. He had a peach-fuzz moustache, but no other facial hair. He wore glasses, an Apple watch, and diamond stud earrings. (Exhibits 2 & 4.) His appearance at the hearing was the same except that he had no facial hair.
6. On June 2, 2018, Ofcr. L. Dysim entered the Licensed Premises. Ramirez entered a few moments later, followed by Ofcr. J. Duarte. Ramirez went to the alcoholic beverage section and selected a 24-oz. can of Corona beer. He took the beer to the counter. The clerk, Claudia Hernandez, was on the phone. Without hanging up, Hernandez scanned the beer. Ramirez looked at the price displayed on the register and handed Hernandez some money. Hernandez gave him some change, after which he exited with the beer. Ofcr. Duarte was second in line behind Ramirez during the transaction, while Ofcr. Dysim was fourth in line.
7. Outside, Ramirez went to the location where an officer was waiting for him. He re-entered the Licensed Premises with various officers. Ofcr. Duarte contacted Hernandez and had her hang up the phone. He identified himself, explained the violation, and had her come out from behind the counter. Ofcr. Duarte asked Ramirez to identify the person who sold him the beer. Standing next to the clerk, he pointed at her. A photo of the two of them was taken (exhibit 4), after which she was cited.
8. Ramirez learned of the decoy program through his role as a cadet. He started working as a cadet in 2012. As a cadet he has participated in leadership activities and has interacted with the public at different events (e.g., parades). The cadet program emphasizes academics and includes writing and making speeches. He testified that he feels confident interacting with the public.
9. Ramirez participated in 10 previous decoy operations, visiting anywhere from five to ten locations each time. Ramirez had been to the Licensed Premises one time a year or two ago with someone who purchased alcohol. He never attempted to purchase alcohol at the Licensed Premises before the June 2, 2018 operation.

10. Co-licensee Carolyn Varner hired Harnek Singh Thiara, a consultant, after the sale in this case. Because of this sale and the presence of transients in the area, Varner wanted to “clean house.” All of the old employees were terminated and new ones hired. Thiara trained the new employees and instituted new policies. The new policy requires employees to ask for ID from anyone who appears to be under the age of 30. All identification must be scanned or swiped. If it does not properly scan or swipe, the employees are to verify the customer’s age through a second form of ID. The visual ID OK button has been removed from the register. The Respondents also instituted a secret-shopper program to ensure that employees are following the new policies. Every three months, all employees are re-trained to ensure that they are up to date with any changes in the law or the Respondents’ procedures.

11. Ramirez appeared his age—19—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 June 2, 2018, Ramirez displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Hernandez.

12. 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 June 2, 2018, the Respondents’ employee, Claudia Hernandez, inside the Licensed Premises, sold an alcoholic beverage to Reynaldo Ramirez, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-9 & 11.)

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 Ramirez—who was stout and well built, had a moustache, and was wearing diamond-stud earrings and an Apple watch—had the appearance of someone over the age of 21, particularly in light of his mature mannerisms and confidence.

This argument is rejected. Although stout, Ramirez's appearance was consistent with that of a person who is 19 years old. His moustache was little more than peach fuzz, indicative of a young person, not a mature one. There is no evidence that Claudia Hernandez even noticed Ramirez's earrings or watch, much less that they had any impact upon her evaluation of his appearance, since she did not testify. Phrased another way, Ramirez had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 11.)

PENALTY

The Department requested that the Respondents' license be suspended for a period of 10 days, arguing that their 30 years of discipline-free operation warranted some mitigation. The Respondents argued that, in light of their discipline-free history and the substantial changes they made after the sale in this case occurred (Finding of Fact ¶ 10), a 5-day, all stayed penalty was appropriate. The Respondents are correct: 30 years without any violations warrants substantial mitigation. Moreover, their response to the sale in this case indicates that the violation was an aberration. The penalty recommended herein complies with rule 144.

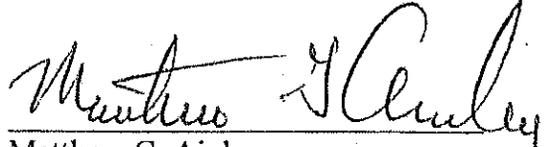
ORDER

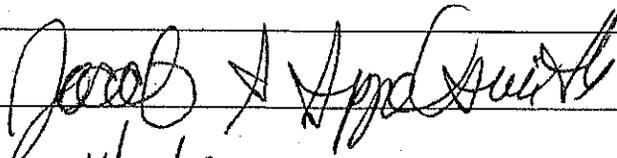
The Respondents' off-sale beer and wine license is hereby suspended for 5 days, with execution of all 5 days of the suspension stayed, upon the condition that no subsequent final determination be made, after hearing or upon stipulation and waiver, that cause for

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

disciplinary action occurred within one year from the effective date of this decision; that should such determination be made, the Director of the Department of Alcoholic Beverage Control may, in his discretion and without further hearing, vacate this stay order and reimpose the stayed penalty; and that should no such determination be made, the stay shall become permanent.

Dated: March 7, 2019


Matthew G. Ainley
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: <u>4/26/19</u>