

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

AB-9931

File: 20-292694; Reg: 21090782

7-ELEVEN, INC., DEBRA L. SEVILLE and FRANK R. SEVILLE,
dba 7-Eleven Store #13958F
1365 East Citrus Avenue
Redlands, CA 92374,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: December 3, 2021
Telephonic

ISSUED DECEMBER 3, 2021

Appearances: *Appellants:* Jade Quintero, of Solomon, Saltsman & Jamieson, as
counsel for 7-Eleven, Inc., Debra L. Seville, and Frank R. Seville;

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

OPINION

7-Eleven, Inc., Debra L. Seville, and Frank R. Seville, doing business as 7-
Eleven Store #13958F (appellants), appeal from a decision of the Department of
Alcoholic Beverage Control¹ suspending their license for 15 days because their clerk

¹ The decision of the Department, dated August 3, 2021, is set forth in the
appendix.

sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code² section 25658(a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on March 14, 1994. There are two prior instances of departmental discipline against the license for violations of section 25658(a) that occurred on October 8, 2011 and June 22, 2012, respectively.

On January 27, 2021, the Department filed a single-count accusation against appellants charging that, on August 21, 2020, appellants' clerk, Evan Vega (the clerk), sold an alcoholic beverage to 18-year-old Garrett Briceno (the decoy). Although not noted in the accusation, the decoy was working for the Redlands Police Department (RPD) at the time.

At the administrative hearing held on May 11, 2021, documentary evidence was received, and testimony concerning the sale was presented by the decoy and RPD Detective Michael Merriman. Co-licensee Debra Lynn Seville testified on appellants' behalf.

Evidence established that the decoy entered the licensed premises on August 21, 2020, and selected a three-pack of 25-ounce Bud Light beer in cans. The decoy was wearing a facemask per instruction by Detective Merriman. The decoy brought the beer to the sales counter and waited in line.

² All statutory references are to the Business and Professions Code unless otherwise stated.

At the sales counter, the decoy placed the beer on the counter, and the clerk asked him if the beer was his only purchase. The decoy replied that it was, and the clerk continued with the sales transaction and sold the beer to the decoy. The clerk did not ask the decoy for his identification or any age-related questions. The decoy exited the store with the beer.

The decoy, along with Detective Merriman and another officer, re-entered the licensed premises. Detective Merriman made contact with the clerk and identified himself as a police officer. Detective Merriman asked the clerk to come out from behind the counter, and asked the decoy to identify the person who sold him the beer. The decoy pointed at the clerk and identified him as the person who sold him the beer. The decoy and the clerk were standing approximately five feet apart and facing each other at the time of the identification. A photograph of the clerk and the decoy was taken with the decoy holding the three-pack of Bud Light beer. (Exh. 6.) The clerk was issued a citation.

On June 2, 2021, the administrative law judge (ALJ) issued a proposed decision sustaining the accusation and recommending a 15-day suspension of appellants' license. The Department adopted the proposed decision on July 22, 2021, and issued a certificate of decision on August 3, 2021. Appellants filed a timely appeal contending that the penalty was excessive.

DISCUSSION

Appellants contend its 15-day penalty is unreasonable, and that the Department's "determination was not based on the evidence, but rather relied on speculation." (AOB, at p. 7.) Specifically, appellants argue that their mitigation evidence was outweighed by the Department's finding that appellants " 'took so long' to

remove any feature that allowed employees to override the system's scanning requirement." (*Id.* at p. 8.)

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].) However, "[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-time³ violation of section 25658(a) is 15 days, which is exactly the penalty appellant received here. (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.)

³ Even though this is technically appellants' third violation, it counts as a first violation since neither of the other two occurred within 36 months. (Cal. Code Regs., tit. 4, § 144.)

Factors in aggravation include prior disciplinary history, prior warning letters, licensee involvement, premises located in high crime area, lack of cooperation by the 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 the subject premises without prior discipline or problems, positive action by the licensee to correct the problem, documented training of the licensee and the employees, and cooperation by the licensee in the 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 take issue with the fact that the Department did not deviate from the standard 15-day suspension. (AOB, at pp. 6-9.) Specifically, appellants disagree with the Department's consideration that it took long to remove the manual override for identification checks. (*Id.* at pp. 7-8.) However, appellants misstate the Department's penalty analysis. In the decision, the Department lists three reasons why it counter-balanced appellants' mitigation evidence:

(1) there was no evidence the Respondents disciplined clerk Vega for the said violation, including for his failure to request, per policy, the ID of decoy Briceno who clearly appeared his age and appeared well under 30 years of age; (2) while Respondents' clerks received training they still figured out how to override the POS' safety protocol, (3) based on Mrs. Seville's testimony she did not know how clerk Vega was able to enable the sale of alcoholic beverages to decoy Briceno on August 21, 2020.

(Decision, at p. 6.) Based on the Department's reasoning, the Board cannot say that the Department abused its discretion in determining appellants' penalty.

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 what appellants received. Rule 144 also allows the Department to exercise discretion to consider aggravation and mitigation. The Department's rejection of appellants' mitigation evidence because it did not show the clerk was disciplined, or how its employees overrode the point of sale system's safety protocols was reasonable and not an abuse of discretion. Therefore, the penalty must stand.

ORDER

The decision of the Department is affirmed.⁴

SUSAN A. BONILLA, CHAIR
MEGAN McGUINNESS, MEMBER
SHARLYNE PALACIO, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴ 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. DEBRA L. SEVILLE & FRANK
SEVILLE
7 ELEVEN 2171 13958F
1365 E CITRUS AVENUE
REDLANDS, CA 92374

OFF-SALE BEER AND WINE - LICENSE

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

RIVERSIDE DISTRICT OFFICE

File: 20-292694

Reg: 21090782

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 July 22, 2021. 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. The appeal must be filed within 40 calendar days from the date of the decision, unless the decision states it is to be "effective immediately" in which case an appeal must be filed within 10 calendar days after the date of the decision. Mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814. For further information, and detailed instructions on filing an appeal with the Alcoholic Beverage Control Appeals Board, see: <https://abcab.ca.gov> or call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.

On or after September 13, 2021, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: August 3, 2021



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., Debra L. Seville, and Frank R. Seville	}	File: 20-292694
Dbas: 7-Eleven Store 2171 13958F	}	
1365 East Citrus Avenue	}	Reg.: 21090782
Redlands, California 92374	}	
	}	License Type: 20
Respondents	}	
	}	Word Count: 11,406
	}	
	}	i-Depo Reporters:
	}	Court Reporter: John Fahrenwald
	}	Video Host: Kevin FitzSimons
	}	
<u>Off-Sale Beer and Wine License</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter by video conference in California, on May 11, 2021.

Alanna Ormiston, attorney, represented the Department of Alcoholic Beverage Control (the Department).

Ralph Saltsman, attorney, represented Respondents, 7-Eleven, Inc., Debra L. Seville, and Frank R. Seville. Debra L. Seville also appeared and testified at the video hearing.

The Department seeks to discipline the Respondents' license on the grounds that, on or about August 21, 2020, the Respondents-Licensees' agent or employee, Evan Vega, at said premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: beer, to Garrett Briceno, 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 May 11, 2021.

FINDINGS OF FACT

1. The Department filed the accusation on or about January 27, 2021.

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 March 14, 1994 (the Licensed Premises).

3. The following is the record of prior Department discipline against the Respondents' license as established by official records introduced by the Department, which matters are final (Exhibits 2 and 3):

<u>Date of Violation</u>	<u>Reg. No.</u>	<u>Violation</u>	<u>Penalty</u>
June 22, 2012	12077329	BP§§25658(a) and 24200.	POIC in lieu of 25-day suspension
October 8, 2011	11076141	BP§§25658(a) and 24200.	10-day, all-stayed suspension

4. Garrett Briceno (hereinafter referred to as decoy Briceno) was born on September 11, 2001. On August 21, 2020, he was 18 years old. On that date he served as a minor decoy in an operation conducted by the Redlands Police Department (Redlands PD).

5. Decoy Briceno appeared and testified at the hearing. On August 21, 2020, he was 5'8" tall and weighed approximately 182 pounds. He wore a black t-shirt, black shorts, and black shoes. Due to the ongoing COVID-19 Pandemic he wore a black face mask. He wore his hair in a comb-over style, with the sides of his head shaved close to his scalp. (Exhibits 4 and 6.) His appearance at the hearing was the same, except that he wore black pants, weighed 170 pounds and his hair was styled in a buzz cut and he did not wear a face mask. During the hearing, the Administrative Law Judge asked the decoy to place a black face mask upon his face as he had on during the said decoy operation. The decoy did as he was asked. He looked his age, whether with or without the face mask.

6. On August 21, 2020, prior to entering the Licensed Premises, decoy Briceno put on a face mask per instruction by Redlands PD Detective Merriman. Decoy Briceno entered the Licensed Premises and selected a three-pack of 25-ounce Bud Light beer cans. He brought the beer to the sales counter for purchase and waited in line behind one person. There was more than one person in line standing behind the decoy.

7. At the sales counter, decoy Briceno placed the Bud Light beer upon the counter. Clerk Evan Vega (hereinafter referred to as clerk Vega) asked the decoy if that was it, to which the decoy replied, "Yes." Clerk Vega continued with the sales transaction and sold the three-pack of Bud Light beer cans to the decoy. Clerk Vega did not ask the decoy for his identification (ID) or any age-related questions. Decoy Briceno had on his person his valid California Driver License, which was vertical in orientation, showed his correct

date of birth and included a red stripe which read, "AGE 21 IN 2022." (Exhibit 5.) Clerk Vega did not ask the decoy to remove his mask. There was a policy in the store at the time that customers and employees were required to wear face masks as part of the COVID-19 safety protocol measures. Decoy Briceno exited the store with the said beer.

8. Decoy Briceno re-entered the Licensed Premises with Redlands PD Detective Merriman and Officer Truong. Detective Merriman made contact with clerk Vega and identified himself as a police officer. Detective Merriman ask clerk Vega to come out from behind the sales counter, which the clerk did. Detective Merriman asked decoy Briceno to identify the person who sold him the beer. Decoy Briceno pointed at clerk Vega and said, "He did," indicating clerk Vega as the person who sold him the beer. Decoy Briceno and clerk Vega were standing approximately five feet apart, facing and making eye contact with each other at the time of this identification. A photograph of clerk Vega and decoy Briceno was taken after the face-to-face identification, with decoy Briceno holding the three-pack of Bud Light beer while standing next to clerk Vega. (Exhibit 6.)

9. After the face-to-face identification a citation was issued to clerk Vega. There was no evidence that clerk Vega was distracted during the sales transaction or the face-to-face identification. Clerk Vega did not appear at the hearing.

10. Decoy Briceno appeared his age 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 in the photographs taken of him during the said decoy operation, as well as his appearance and conduct in front of clerk Vega at the Licensed Premises on August 21, 2020, decoy Briceno displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the clerk. At the hearing, decoy Briceno appeared his age.

11. As of the date of the hearing, decoy Briceno went to the gym approximately four days a week. In July and August of 2020, decoy Briceno engaged in physical workouts more often. In high school decoy Briceno played baseball and wrestled. Prior to August 21, 2020, decoy Briceno had been in the Licensed Premises on approximately 50 occasions. On March 14, 2020, decoy Briceno was part of minor decoy operation conducted at the Licensed Premises at which time he was not successful in purchasing alcoholic beverages. (Exhibit A9).

12. Detective Merriman appeared and testified at the hearing. He was one of the officers involved in minor decoy operations conducted at the Licensed Premises on October 14, 2016, March 20, 2018, January 24, 2020, and March 14, 2020, at which times no violations occurred therein. (Exhibits A7, A8, A9, A11 and A15.)

13. Debra Lynn Seville appeared and testified at the hearing. Mrs. Seville has been a co-franchisee of the Licensed Premises for approximately 29 years. She actively participates in the management and operation of the Licensed Premises. Mrs. Seville ensures all of Respondents' employees undergo alcoholic beverage training using the 7-Eleven "Come of Age" computer-based training module. A test is administered after the training, which requires a 100 percent pass rate. Clerk Vega underwent the afore-described training. After Respondents' clerks complete their training they are "brought on the floor for probably three to five days, depending on their needs," and are monitored during their shifts. Employees are taught how to ID customers, refuse sales to intoxicated customers and other specific alcohol-related sales protocol. In August of 2020, employees were supposed to ask for the ID of customers appearing under 30 years of age. The Respondents' point of sale (POS) system allowed their clerks to either slide a customer's ID along the register or manually enter a customer's date of birth in the POS system. Mrs. Seville said the clerks learned how to override the POS safety protocol during age-restricted sales transactions, thereby enabling those transactions to proceed.

14. After the said violation of August 21, 2020, the Respondents changed their policy making it mandatory for their clerks to ask for the ID of every customer. Additionally, Mrs. Seville removed the override function on the cash register, which Respondents' clerks figured out how to use during age-restricted sales to allow them to proceed. The point of sale (POS) system, since the change, only permits Respondents' clerks to either scan or slide a customer's ID for age-restricted sales. The clerks can no longer manually enter a date of birth into the POS system and/or override the safety protocol of the POS system.

15. There was no evidence the Respondents disciplined clerk Vega for selling alcoholic beverages to decoy Briceno on August 21, 2020. There was no evidence presented as to how clerk Vega overrode the POS safety protocol in place at the time to enable the said sale to the decoy.

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 August 21, 2020, the Respondents-Licensees' employee, clerk Evan Vega, inside the Licensed Premises, sold alcoholic beverages, to-wit: a three-pack of 25-ounce cans of Bud Light beer, to Garrett Briceno, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-10.)

5. The Respondents argued 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).

6. With respect to rule 141(b)(2), Respondents argued decoy Briceno did not have the appearance of someone under the age of 21 for the following reasons: (1) he worked out regularly (2) he has a mature voice and manner of speaking, and (3) Respondents' counsel opined that the decoy had a receding hairline in the photographs and during the hearing.

7. This rule 141(b)(2) argument is rejected. The Respondents arguments are speculative and subjective on the part of Respondents' counsel. Respondents presented no evidence as to why clerk Vega allegedly believed decoy Briceno to be over 21 years of age. Clerk Vega did not testify. There was nothing about decoy Briceno's demeanor, physical stature, workout regimen, voice or hairline which made him appear older than his actual age.³ In other words, decoy Briceno had the appearance generally expected of a person under the age of 21. (Findings of Fact ¶¶ 5 and 10.)

8. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties' lack merit.

PENALTY

The Department requested the Respondents' license be suspended for a period of 15 days, pursuant to the guidelines set forth in rule 144 for first-time violations.

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

³ The undersigned did not find the decoy to have a receding hairline, as claimed, but saw the decoy to have a thick head of hair which he shaved close to the scalp on the sides of his head.

The Respondents recommended either an all-stayed suspension or a 5-day suspension should the accusation be sustained. The Respondents argued for a mitigated penalty based on the following: (1) Respondents, subsequent to August 21, 2020, removed the override function on their POS system, making it mandatory for their clerks to either slide or scan customer IDs on the POS and ask for customer IDs no matter their age; (2) the testified to training Respondents' clerks undergo; (3) the Respondents' clerks were successful in preventing sales to minors during decoy operations at the Licensed Premises on October 14, 2016, March 20, 2018, January 24, 2020, and March 14, 2020.

In assessing an appropriate measure of discipline, the Department's penalty guidelines are in California Code of Regulations, Title 4, Division 1, Article 22, section 144, commonly referred to as rule 144. Under rule 144, the presumptive penalty for a first violation of selling or furnishing an alcoholic beverage to a minor in violation of section 25658 is a 15-day license suspension. Rule 144 also permits imposition of a revised penalty based on the presence of aggravating or mitigating factors.

The Respondents are correct that mitigation is warranted for the line items referenced above. However, that mitigation is counter-balanced by the following: (1) there was no evidence the Respondents disciplined clerk Vega for the said violation, including for his failure to request, per policy, the ID of decoy Briceno who clearly appeared his age and appeared well under 30 years of age; (2) while Respondents' clerks received training they still figured out how to override the POS' safety protocol, (3) based on Mrs. Seville's testimony she did not know how clerk Vega was able to enable the sale of alcoholic beverages to decoy Briceno on August 21, 2020. This is of grave concern. For someone who claims to be a very active participant in the management and operation of the Licensed Premises, she failed to ascertain how the sale was made. However, based on Mrs. Seville's testimony it is more probable than not that clerk Vega was one of the clerks about whom she testified who "figured [] out" how to override the Respondents' POS safety protocol relating to age-restricted sales. Either there was an override button or clerks were manually entering a pseudo birthdate to enable the age-restricted sales to proceed. While the Respondents' finally took care of that loophole, it is unclear why it took the Respondents so long to make this adjustment to their POS system despite two prior sales to minors in 2011 and 2012. Although the underlying circumstances relating to the sale in 2011 are not known, the clerk in the 2012 sale was somehow able to bypass any potential safety protocol at that time. While these two priors are too remote to constitute aggravation, the Respondents' failure to correct this problem back in 2012 undercuts the mitigation had from removing said override function. 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: June 2, 2021



D. Huebel
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By:  _____
Date: <u>07/22/21</u> _____