

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

In the Matter of the Accusation Against:

7-Eleven, Joanna So Ae Yi & Richard Shin Sung Yi
Db a 7-Eleven #2173-25848
3470 W. 6th St.
Los Angeles, CA 90020

Licensee(s).

File: 21-215340

Reg: 17085326

**PRECEDENTIAL DECISION
No. 19-03-E**

DESIGNATION AS PRECEDENTIAL DECISION

Pursuant to Government Code Section 11425.60, the Department of Alcoholic Beverage Control hereby designates as precedential its decision, dated January 29, 2018, in the above-referenced action.

This decision is designated precedential effective April 18, 2019.



JACOB APPELSMITH, Director
Department of Alcoholic Beverage Control

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

**IN THE MATTER OF THE ACCUSATION
AGAINST:**

7-Eleven, Joanna So Ae Yi & Richard Shin
Sung Yi
Dba 7-Eleven #2173-25848
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DECISION UNDER GOVERNMENT CODE SECTION 11517(c)

The above-entitled matter having regularly come before the Department on January 29, 2018, for decision under Government Code Section 11517(c) and the Department having considered its entire record, including the transcript of the hearing held on July 19, 2017, before Administrative Law Judge Matthew G. Ainley, and the written argument of the parties, and good cause appearing, the following decision is hereby adopted:

The Department seeks to discipline the Respondents' license on the grounds that, on or about November 4, 2016, the Respondents, through their agent or employee, sold, furnished, or gave alcoholic beverages to Karina Ardon, 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 July 19, 2017.

FINDINGS OF FACT

1. The Department filed the accusation on February 8, 2017.

¹ All statutory references are to the Business and Professions Code unless otherwise noted.

2. The Department issued a type 21, off-sale general 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. Karina Ardon was born on February 4, 1997. She served as a minor decoy during an operation conducted by LAPD on November 4, 2016. On that date she was 19 years old.
5. Ardon appeared and testified at the hearing. On November 4, 2016, she was 5'6" tall and weighed 165 pounds. She wore a graphic shirt, a black jacket, black pants, and black shoes. She had long hair which came down to her rib cage. It was parted in the middle and pinned on both sides. She was not wearing any make-up except minor foundation and stenciled eyebrows. Her lips were red because they were chapped from the cold November weather. (Exhibits 5-7.)
6. On November 4, 2016, Ofcr. Francisco Guzman entered the Licensed Premises. Ardon entered a few moments later and walked to the cooler. She selected a 24-oz. can of Bud Light beer from the cooler and took it to the register. There were two clerks behind the counter and one person in line ahead of her. When it was her turn, she set the beer down on the counter. The clerk, Mohammed Ikbal Hossain, scanned the beer. Ardon paid and received some change from Hossain. Hossain asked her if she wanted a bag; she said she did not.
7. The person standing in line behind her commented, "Wow, they didn't even card you." He then asked her where she was from. She replied that she was from out of town, then exited with the beer.
8. Outside, she met up with the officers, then re-entered the Licensed Premises. Ofcr. Guzman contacted Hossain and identified himself. He asked Hossain to move to one side, which he did. Ofcr. Guzman asked Ardon to identify the person who sold her the beer. She pointed to Hossain and said that he had. Ardon and Hossain were approximately three feet apart on opposite sides of the counter at the time. A photo of the two of them was taken (exhibit 5), after which Hossain was cited.
9. Ardon learned of the decoy program through her role as an LAPD cadet. She had been a cadet for four to five years before November 4, 2016, working approximately 20 hours a month. She attended weekly meetings and volunteered to work community events. As a cadet she wears a uniform and has to behave in a mature and responsible manner. November 4, 2016 was her fourth time working as a decoy. Each time she visited approximately 15 locations. On November 4, 2016, she visited three locations; the Licensed Premises was the only one which sold alcohol to her. She was nervous while inside the Licensed Premises.

10. Hossain testified that he has been employed at the Licensed Premises since 2009. Currently, he is the store manager. Based on his experience working at the Licensed Premises, he believed that Ardon was 24 or 25 years old. Khodeza Kahtun also was working at the Licensed Premises on November 4, 2016. He saw Ardon while she was purchasing the beer. In his opinion, Ardon appeared to be 25 years old.

11. The Respondents' policy is to request ID from anyone who appears to be under the age of 30. A notice posted on the register reminds the clerks of this policy. A card reader is attached to the register. When an alcoholic beverage is rung up, the register displays a prompt. The clerk must press "OK," swipe an ID, or enter a date of birth. Because Hossain believed that Ardon was over the age of 21, he pressed "OK." Hossain could not explain why he did not request ID from Ardon even though she appeared to be under the age of 30.

12. Ardon appeared her age 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 November 4, 2016, Ardon displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Hossain.

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 November 4, 2016, the Respondents' clerk, Mohammed Ikbal Hossain, inside the Licensed

Premises, sold an alcoholic beverage to Karina Ardon, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-12.)

5. The Respondent 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 Ardon appeared to be in her mid-20s based on her red lips, weight, and confidence. This argument is rejected—Ardon’s appearance was consistent with her actual age, 19. In making this determination, the self-serving testimony of the two clerks is specifically rejected since they have reason to favor their employers. Notably, another customer in line was surprised that Hossain had sold alcohol to Ardon without checking her ID, an indication that she appeared too young to purchase alcohol.

PENALTY

1. The Department requested a 25-day suspension in light of the prior violation (in registration number 16083847; heard immediately prior to the hearing in the instant matter), even though it was still pending. Respondents argued that an all-stayed penalty would be appropriate given their over 28 years of discipline-free history.

2. At hearing, and in written argument upon review, counsel for the Department made clear that its recommendation was not based upon the current violation being a “second strike” under section 25658.1(b). Indeed, section 25658.1(c) precludes the use of a prior violation in determining whether a licensee has suffered three (3) violations within any 36-month period until the Department’s decision regarding that prior violation is final. Rather, the Department requested an aggravated penalty based upon Respondents having been placed on notice of a problem concerning alcoholic beverages being sold to minors, as evidenced by the accusation filed in the earlier matter.

3. In their written argument on review, Respondents asserted that the facts regarding the earlier accusation are not in the record in the instant matter and thus may not be considered for purposes of discipline. While it is true that the Department did not present evidence of the facts concerning the previous alleged violation, the accusation in this matter did identify that prior accusation for “purposes of imposition of penalty, if any,” and further indicated that the other accusation was based upon an alleged violation of section 25658(a), the same provision alleged to have been violated in the instant action. The fact that registration number 16083847 is pending is indeed in the record. By virtue of this, Respondents had adequate notice of the prior alleged violation such that it may be used in the instant case for purposes of penalty consideration.

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

4. Moreover, as an official record of the Department, official notice of it may be taken in this matter pursuant to Government Code section 11515 and Evidence Code sections 452(d)(1) and 452(c). Government Code section 11517(c)(2)(E) further authorizes the Department to take additional evidence as part of its review of the proposed decision. Pursuant to these authorities, official notice is taken of the accusation on file with the Department in registration number 16083847 (and its related proof of service) and it is admitted as exhibit 8.

5. To be clear, the prior accusation in registration number 16083847 is not being accepted or considered at this time for purposes of whether or not the Department may order revocation of the license under section 25658.1(b). Nor is the allegation of a prior violation being considered as having been proven. Rather, the accusation is being considered for purposes of notice. Nothing in section 25658.1, or elsewhere, precludes the use of prior actual notice of an alleged violation of section 25658(a), whether by way of verbal or written warning, or of a pending accusation, as an aggravating factor in determining the appropriate level of discipline following a determination that the licensee has subsequently violated the same law.

6. The accusation in registration number 16083847 was served on Respondents on February 24, 2016. The violation in the instant matter occurred on November 4, 2016. Thus, at the time of the instant violation, Respondents were well aware of the prior accusation and thus were placed on notice that one of their clerks had allegedly sold an alcoholic beverage to a minor. For purposes of notice, it does not matter that the prior accusation is not final, or even whether it is sustained. Nor is the Department under any obligation to “prove-up” the prior alleged violation before an accusation on file, and served upon the licensee, may be considered as notice in a subsequent matter.

7. Despite having been put on notice of a problem, Respondents presented no evidence of any positive steps taken to insure compliance with the law since the previous alleged sale of an alcoholic beverage to a minor, which occurred only a little over one year prior to the sale in the instant case. Indeed, Respondents presented no evidence of any changes at all to their business operations since September 12, 2015, the date of the prior alleged violation, which would help them avoid selling alcoholic beverages to minors.

8. The complete failure to take any reasonable steps to prevent alcoholic beverages being sold to minors, despite having actual notice of a problem, is an aggravating factor that counter-balances any mitigation that may be had from a lengthy history of licensure without discipline.

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9. In balancing the aggravation and mitigation, the following Order is consistent with Rule 144.

ORDER

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

Sacramento, California

Dated: January 29, 2018

Jacob A. Appelsmith
Director

Pursuant to Government Code section 11521(a), any party may petition for reconsideration of this decision. The Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or on the effective date of the decision, whichever is earlier.

Any appeal of this decision must be made in accordance with Chapter 1.5, Articles 3, 4 and 5, Division 9, of the Business and Professions Code. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.