

ISSUED JUNE 9, 1997

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

BRITTNI Y. & KHIET H. NGUYEN	)	AB-6662
dba La Habra Liquor)	
572 W. La Habra Blvd.	)	File: 21-292537
La Habra, California 90631,	)	Reg: 95034195
Appellants/Licensees,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Rodolfo Echeverria
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL.	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	February 5, 1997
	)	Los Angeles, CA
)	

Brittini Y. and Khiet H. Nguyen, doing business as La Habra Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for co-appellant Khiet H. Nguyen having sold a 40-ounce bottle of malt liquor to a 16-year-old minor on March 18, 1995, contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellants Brittini Y. and Khiet H. Nguyen,

¹ The decision of the Department dated April 25, 1996, is set forth in the appendix.

appearing through their counsel, Kevin O'Connell; and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on March 7, 1994.

Thereafter, the Department instituted an accusation alleging that appellant Khiet H. Nguyen ("Khiet") had, on March 18, 1995, sold a 40-ounce bottle of malt liquor to a 16-year old minor.

An administrative hearing was held on March 5, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the sale transaction in question. Subsequent to the hearing, the Department issued its decision which stated that Khiet was observed making the sale of the malt liquor to the minor by a uniformed reserve police officer of the City of La Habra. Khiet did not ask for the minor's identification until after the sale had been made and the police officer entered the store and confronted the youth. The attorney for the Department recommended a 25-day suspension, with 10 days of the suspension stayed, stating that the violation was aggravated because of the age of the minor. The Administrative Law Judge (ALJ) imposed only a 15-day suspension, and the Department thereafter adopted the ALJ's proposed decision. Appellants filed a timely notice of appeal.

Appellants raise the following interrelated issues: (1) a licensee must have actual or constructive knowledge of the violation before being subjected to license suspension or revocation; and (2) a licensee who acts in good faith, free from intent to violate the law, has a valid defense.

DISCUSSION

Appellants cite language from Laube v. Stroh (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779], concerning the requisite knowledge which must be possessed by a licensee before that licensee may be charged with having “permitted” unacceptable conduct on the licensed premises so as to be subject to license suspension or revocation. They argue that Khiet demanded identification from the minor, but then misread the age of the minor. Consequently, they argue, there is no evidence of either actual or constructive knowledge of wrongdoing.

Appellants also cite language from Kirby v. Alcoholic Beverage Control Appeals Board (1968) 267 Cal.App.2d 895 [73 Cal.Rptr. 352] to the effect that proof of a lack of intent to violate the law is an affirmative defense.² They contend that the fact that identification was requested is proof the clerk intended to comply with the law.

Neither Laube nor Kirby have any real application to this case. Laube addressed the issue of when a licensee may be responsible for permitting drug transactions in the licensed premises when there was no reason for the licensee to suspect they were occurring. Kirby addressed the good faith defense under Business and Professions Code §25660 available to a licensee who relies for proof of age on a document issued by a governmental agency.

In Munro v. Alcoholic Beverage Control Appeals Board (1957), the court stated that §25658 does not require that the act be knowingly done.

² Both of the “quotations” in appellants’ brief appear to be paraphrases of portions of the courts’ opinions, rather than correct quotations.

This is not a case where Khiet relied on a document purporting to show that the purchaser was 21, nor one where he had no reason to know what was going on. This was a simple case of a sale of beer to a 16-year-old minor, where the proof of the violation was clear-cut. The reserve police officer saw the transaction in progress, entered the store, confronted the minor who was on his way out of the store, and seized the malt liquor. He then requested the minor's identification, and was given a driver's license which showed that the minor would be 21 in 1999. Khiet then seized the license from the officer and, using his fingers to count, appeared to be attempting to compute the minor's age. By then, the sale transaction had already been completed.

Khiet, although present at the administrative hearing [RT 8], did not testify, so the contention that he misread the driver's license is without any record evidence to support it. In fact, there is evidence to the contrary. The reserve officer who made the arrest testified that Khiet told him that "he didn't have time to check everybody's I.D. because it was too busy" [RT 11]. Khiet had not even requested any identification until he saw the officer approaching; he then asked the minor for identification, looked at it, and handed it back; the minor then started to leave the store with his purchase when he was stopped by the officer [RT 9]. It was at this point that the officer requested the minor's driver's license, showed it to Khiet, who appeared to count on his fingers and then attempt to explain the sale by saying he was too busy to check identification [RT 11].

Appellants concede Khiet was negligent, but contend that the fact that he demanded identification "prior to completely selling" the malt liquor shows he

intended to comply with the law. Appellants suggest that theirs be found to be an “imperfect defense” so as to warrant a monetary fine rather than a license suspension.

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].) The decision to order the 15-day suspension is one squarely within the Department's discretion.³

CONCLUSION

The decision of the Department is affirmed.⁴

BEN DAVIDIAN, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³ We note that the penalty would appear to be one eligible for resolution by way of a petition for offer in compromise, the grant or denial of which is, once again, a matter solely within the sound discretion of the Department.

⁴ 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 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.