

ISSUED JUNE 9, 1997

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

SUNG H. and YONG HAN	)	AB-6727
dba HMC Liquor)	
9435 East Washington Boulevard	)	File: 21-096761
Pico Rivera, CA 90660,	)	Reg: 96036042
Appellants/Licensees,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Ronald M. Gruen
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	April 2, 1997
	)	Los Angeles, CA
)	

Sung H. and Yong Han, doing business as HMC Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their off-sale general license for 15 days for their clerk having sold or furnished alcoholic beverages to a minor, being 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).

¹ The decision of the Department dated September 5, 1996, is set forth in the appendix.

Appearances on appeal include appellants Yong and Sung Han; and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on October 7, 1986.² Thereafter, the Department instituted an accusation alleging that on December 2, 1995, appellants' clerk sold, furnished or caused to be sold alcoholic beverages (wine) to a 15-year old minor.

An administrative hearing was held on August 14, 1996, at which time oral and documentary evidence was received. At that hearing, the testimony of a Department investigator and the 15-year-old minor was presented. That testimony showed that the minor attempted to purchase two bottles of Boone's Farm strawberry wine, but was refused when he was unable to produce any identification when requested to do so by appellants' clerk. The minor then left the store, and returned shortly thereafter with an adult male. The two returned to the counter with the same two bottles of wine and a non-alcoholic snack. The clerk, without asking any questions, rang up the sale while the minor and the adult stood in front of him. While still at the counter, the adult split the change with the minor, and removed his non-alcoholic purchase from the sack. The minor then picked up the sack containing the two bottles of wine, and left the store.

² See note 3, infra.

He was stopped by Department investigators while leaving the parking lot.

The Administrative Law Judge (ALJ) found that the clerk knew or should have known, based upon what had occurred in his direct presence, that the alcohol was being sold or furnished to a minor. The Department adopted the ALJ's decision, and this appeal followed.

In their appeal, appellants raise the following issues: (1) The sale was to an adult; the adult and not the licensee is responsible for what the adult does with the alcoholic beverage thereafter; and (2) the penalty is excessive.

DISCUSSION

I

Appellants contend that since the sale was to an adult, it is the adult who should be considered legally responsible for furnishing the alcoholic beverage to the minor. They argue that it is improper to hold the clerk or the store responsible once a legal sale has been made to an adult.

The Department, on the other hand, contends that the clerk was on constructive, if not actual, notice that the minor was the intended consumer. Therefore, by his affirmative act of selling the wine to the adult, in the immediate presence of the minor, shortly after having refused to sell the same wine directly to the minor, the clerk sold or furnished the alcoholic beverage to the minor.

This is not a close case on the facts. The clerk had only shortly before refused

to sell the same two bottles of Boone's Farm strawberry wine to the minor. Then, when the minor returned, accompanied by an adult, the clerk made the sale, observed the adult split the change with the minor, and then permitted the minor to take possession of the wine.

Based upon his earlier refusal to sell to the minor, the clerk knew or had reason to believe that the minor was, in all probability, the intended consumer of the wine. Therefore, he should have refused to make the sale. Worse, he took no action after ringing up the sale to retrieve the wine once he saw the adult and the minor split the change from the transaction and the minor then take possession of the wine. At that point he was unquestionably under a duty to attempt to take appropriate action to undo the transaction.

In all probability, a licensee who sells for off-premises consumption may from time to time make a sale of an alcoholic beverage to an adult who, unbeknownst to the licensee, intends to sell or give the beverage to an underage person. In such a circumstance, the argument that the licensee is not responsible may have merit. But here, there were too many red flags that went unheeded by the licensee's clerk.

II

Appellants contend that the penalty is excessive, arguing that appellants' 20-

year unblemished record as a licensee,³ coupled with the uncertainty over who is legally responsible for furnishing the alcoholic beverage to the minor, warrants a lesser penalty.

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].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

The Department recommended a 20-day suspension, arguing that the facts of the transaction justified an upward departure from the normal penalty for a sale to a minor. Appellants' counsel at the administrative hearing argued that the minor's efforts to associate himself with an adult, so as to deceive the clerk, should be considered a mitigating factor.

The ALJ concluded that the evidence did not justify the "harsh" penalty proposed by the Department, stating that the interests of justice would best be served by the imposition of the standard penalty for a sale-to-minor violation, fifteen days. The ALJ acknowledged appellants' previously unblemished record, and also took into

³ Appellants' brief claims that appellant Yong Han has been licensed as HMC Liquor since 1980, and was licensed at a different store for four years prior to that. The accusation states that appellants' present license issued in 1986.

account the fact that the clerk was no longer employed by appellants. In adopting the proposed decision, the Department acceded to the ALJ's views. Nonetheless, at the oral hearing the Department characterized the violation as aggravated, in light of the "quite youthful appearance" of the minor.

Given these competing considerations, it can not be said that the Department's action constitutes an abuse of discretion. Therefore, this Board is powerless to alter the penalty imposed by the Department.

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

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.