

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

AB-8271

File: 21-323425 Reg: 03055881

ADEL M. NASHAL dba Frank's Market
381 South 36th Street, Richmond, CA 94804,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Stewart A. Judson

Appeals Board Hearing: April 7, 2005
San Francisco, CA

ISSUED JUNE 17, 2005

Adel M. Nashal, doing business as Frank's Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended his license for 25 days, 15 of which were conditionally stayed, subject to one year of discipline-free operation, for having sold alcoholic beverages (a 750 ml. bottle of Hennessy Cognac, a 750 ml. bottle of Aleze Red Passion (Natural Passion Fruit, Cranberry and Cognac), and a 200 ml. bottle of Bacardi Razz (Raspberry Rum)) to Alison Post (hereinafter "Post"), a 19-year-old non-decoy minor, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Adel M. Nashal, appearing through his representative, Charles Benninghoff, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

¹The decision of the Department, dated April 1, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on October 21, 1996. Thereafter, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to Post, a minor, on June 3, 2003. The accusation also alleged a previous sale to a minor on July 17, 2001, that was resolved by payment of a fine in lieu of a 10-day suspension.

An administrative hearing was held on January 9, 2004, at which time oral and documentary evidence was received. Post and a 19-year-old friend who accompanied her intended to make a birthday gift of the purchases for Post's 22-year-old ex-boyfriend. The two intended to split the cost. When it appeared that they did not have enough cash, Post attempted to use a debit card. Both she and a clerk who assisted her had trouble using the card, until she realized she needed to obtain authorization. She was loaned the store phone to make the call, obtained the necessary authorization, and the sale was consummated by a second clerk. Post was not asked her age or for identification.

Appellant did not contest the fact that the sale took place, but argued that the clerks were misled by Post's mature appearance, and that the Department abused its discretion when it issued citations to both clerks. Neither clerk testified. The transaction was witnessed by two Department investigators whose attention had been brought to the two minors by their youthful appearance. Brian Chan, one of the investigators, testified at the hearing, as did Post, Joe Mobley, another Department investigator, and Charles Whitney, a Richmond police officer. Adel Nashal testified on his own behalf.

Subsequent to the hearing, the Department issued its decision which determined

that the charge of the accusation had been established.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) the penalty is unduly harsh considering the amount of time since appellant's last discipline (two years, two months) and the mature appearance of the minor; (2) the minor presented the appearance of a person over the age of 21; and (3) the Department abused its authority when its investigator issued a citation to a clerk who did not make the sale.

DISCUSSION

I

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].)

Appellant argues that the penalty, a 25-day suspension, though stayed as to 15 of those days, is unduly harsh when viewed in the context of other decisions of the Department.

The Department appears to have considered several factors in its determination of an appropriate penalty, including the existence of a prior sale-to-minor violation, the fact that the minor had been purchasing alcoholic beverages at the premises since the age of 16 or 17, and her mature appearance.

[C]onsideration has been given to Post's demeanor and likely appearance when the sale was made. It is also clear that, while her appearance then might have been questionable, she was sufficiently youthful in appearance that a reasonably

prudent seller of alcoholic beverages would have requested bona fide evidence of her age before accomplishing the sale. Post was 19 years old when she successfully bought the alcohol. With regard to other aggravating factors, the provisions of Section 25658.1(a) have also been considered.²

The Department stayed the largest part of the penalty, and appellant need only avoid selling to a minor for one year to hold the suspension to 10 days.

The appropriateness of the penalty must be left to the discretion of the Department. The Department appears to have exercised its discretion reasonably, and, finding no abuse of discretion, we are not inclined to disturb the penalty.

II

Department counsel conceded that, if the minor had been acting as a police decoy, “we clearly would have an issue about Ms. Post’s appearance.” The minor was on her way to a party, and had dressed accordingly, wearing a short skirt, a tank top, a long-sleeved shirt, high heels and makeup. Appellant argues that she presented such a mature appearance that it is essentially unfair to subject appellant to discipline under such circumstances.

Post’s testimony that she had been purchasing alcoholic beverages at appellant’s premises since she was 16 or 17 was not disputed. Since neither clerk testified, we do not know whether it was her appearance at the time of the sale or their possible familiarity with her as a long-standing customer that induced them to make the

² At the time of this decision, Business and Professions Code section 25658.1, subdivision (a), provided that no licensee may petition for an offer of compromise, i.e., payment of a fine in lieu of serving a suspension, for a second or subsequent sale-to-minor violation within a 36-month period. The statute was amended in August, 2004 to preclude an offer of compromise for a third violation that occurs within 36 months of the original violation. Reading this new language in conjunction with concurrent amendments to Business and Professions Code section 23095, subdivision (e), we could speculate that the Department, in anticipation of these amendments, was advising appellant that an offer of compromise could be available.

sale.

Section 25658 does not require that a sale to a minor be done knowingly. It is enough that a sale is made. It is incidents such as the one in this case that confirm the wisdom of a policy of checking the age of any prospective purchaser who appears to be under the age of 30. Such a policy may well result in a large number of adults being asked for identification, but it will also catch the minor who appears to be older than he or she actually is.

Post testified that she was not asked for identification, and had never carried false identification. Consequently, no defense of reliance upon governmentally-issued identification is available under Business and Professions Code section 25660, and appellant made no attempt to assert such a defense.

III

Appellant criticized the issuance of citations to both clerks, contending that all one of the two did was assist in the use of the debit card. Appellant was at a loss, however, to say what remedy should be afforded for what he called an abuse of process. Appellant also claims the decision reflects the confusion regarding which of the clerks actually made the sale.

Rule 141(b)(5) requires a minor decoy to make a face-to-face identification of the person who sold the alcoholic beverage. If this were a minor decoy case, an issue of which clerk was identified as having made the sale would be a matter of concern. But this is not a minor decoy case, and Rule 141 has no applicability.

A citation issued in error, if that were the case, does not result in the issuance of an accusation, and is not a bar to discipline where there is no dispute that one or the other of two clerks made the sale. Whether the citation was properly issued is a matter

for the court, not the Department.

That is not to say that an intentional and malicious issuance of a criminal citation should go unpunished. A civil remedy may well lie. That is not a matter within this Board's charter, and we see nothing in the record to indicate that occurred here.

ORDER

The decision of the Department is affirmed.³

TED HUNT, CHAIRMAN
SOPHIE C. WONG, MEMBER
FRED ARMENDARIZ, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³ 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 final 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.