

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

AB-8527

File: 21-392686 Reg: 05060466

MAHER MAKHOUL HAWARA and ZAHER MIKE HAWARA dba Bistro Liquor
6441 Edinger Avenue, Huntington Beach, CA 92647,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: November 2, 2006
Los Angeles, CA

ISSUED MARCH 28, 2007

Maher Makhoul Hawara and Zaher Mike Hawara, doing business as Bistro Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 25 days for their clerk, Miguel Cortez, having sold a 750 ml. bottle of Jack Daniels Whisky, an alcoholic beverage, and a 20-bottle case of Coors Light beer to Jared Zurn, an 18-year-old non-decoy minor, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Maher Makhoul Hawara and Zaher Mike Hawara, appearing through their counsel, Rick A. Blake, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated February 2, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on June 11, 1997. On August 22, 2005, the Department instituted an accusation against appellants charging the sale of alcoholic beverages to a minor on June 17, 2005. An administrative hearing was held on December 8, 2005, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Jared Zurn, the minor; Kevin Kenny, a Department investigator; and Miguel Cortez, the clerk who made the sale. The evidence established that Zurn (the minor) presented a New York driver's license which had originally been issued to Jared Peel, a friend of Zurn. The license had expired about 18 months earlier. The clerk testified that he believed the license to be genuine, and that Zurn was the person pictured on the license, but failed to note that it had expired 18 months earlier. Zurn originally intended to purchase another 20-bottle case of Coors Light beer, but did not have enough money. When Zurn turned to his companions for additional funds, the clerk refused to permit the sale to them because they had no identification.

Kenny apprehended Zurn as he left the store with his purchases and asked him his age. Zurn admitted to Kenny that he was only 18 years of age. Kenny examined the license which Zurn had presented to the clerk, and although he thought the photo on the license resembled Zurn somewhat, his attention was quickly drawn to the fact of the license's expiration.

Subsequent to the hearing, the Department issued its decision which determined that the offense had occurred as alleged, that appellants had conceded that they had not established a defense under Business and Professions Code section 25660, and ordered the suspension from which this timely appeal has been taken.

Appellants contend that the penalty is excessive, and that the evidence established facts in mitigation.

DISCUSSION

Appellants argue that the failure to acknowledge that the clerk's efforts in checking the minor's identification warranted a mitigation of the penalty, and that the failure to reflect such mitigation in the otherwise standard penalty effectively nullified Department Rule 144.

Rule 144 (4 Cal. Code Regs., §144) sets out the penalties ordinarily imposed for violations of the ABC Act. Among other things, the rule sets out certain factors in aggravation and mitigation which, if present, may warrant an adjustment in the penalty. Appellants argue that the clerk's action in refusing a sale to two individuals warranted a mitigation of the penalty to be imposed for having sold to the minor.

Conceding that a defense under Business and Professions Code section 25660 (reliance upon government-issued identification) had not been established, appellants nonetheless argue for a mitigation of the standard penalty for a second violation within a 36-month period, asserting that the clerk was sincere in his effort to check Zurn's identification, even though he did not notice items that would have led him to act differently.

The administrative law judge (ALJ) declined to mitigate the penalty. He wrote, in his proposed decision (Conclusion of Law 9):

While clerk Cortez was diligent in requesting ID from all the possible participants in the subject transaction, his failure to notice the expired status of Zurn's ID and his willingness to accept an out of state license without even knowing what a New York license looked like does not permit the conclusion that he acted in good faith reliance or as a reasonably prudent seller would have under the circumstances. It was by no means established that Cortez intended to make an unlawful sale of alcoholic beverages. However, he was quite sloppy

in the inspection he did make of the Exhibit 2 license. The second-offense sanction requested by Complainant should ensure further training and more prudent and reasonable inspection of identification in the future.

The appeal for mitigation is without merit for two reasons. First, it asks the Board to reweigh the evidence concerning the clerk's efforts and disregard the ALJ's findings concerning the inadequacy of the clerk's examination of the license. The Board is not permitted to do this. Second, it asks the Board to substitute its opinion of an appropriate penalty for that of the Department. The Appeals Board may 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].) None has been demonstrated here.

ORDER

The decision of the Department is affirmed.²

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

² 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.