

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

AB-9913

File: 21-565750; Reg: 19088877

MES WESTERN LIQUOR, INC.,
dba Western Liquor
22300 Norwalk Boulevard
Hawaiian Gardens, CA 90716,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: September 3, 2021
Telephonic

ISSUED SEPTEMBER 13, 2021

Appearances: *Appellant:* Joshua Kaplan, as counsel for MES Western Liquor, Inc.,

Respondent: Lisa Wong, as counsel for the Department of Alcoholic Beverage Control.

OPINION

MES Western Liquor, Inc., doing business as Western Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control (Department)¹ revoking its license (with the revocation stayed for a period of 3 years provided no further cause for discipline arises during that time) and suspending its license for 20 days, because appellant or its employee bought, received, withheld, or concealed alcoholic beverages, believing them to be stolen, in violation of Penal Code sections

¹ The decision of the Department under Government Code section 11517(c), dated April 12, 2021, is set forth in the appendix.

664 and 496, subdivision(a), and suspending its license for 15 days because its employee sold an alcoholic beverage to a Department minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on March 30, 2016. There is no record of prior departmental discipline against the license.

On May 28, 2019, the Department instituted a five-count accusation against appellant charging that, on three separate occasions in 2018, appellant or his employee bought, received, withheld, or concealed purportedly stolen property, and on one occasion sold an alcoholic beverage to an individual under the age of 21, who was working as a minor decoy for the Department at the time. The accusation alleged four counts under Penal Code sections 664/496(a), with count 1 charging a violation by the licensee, Morkos Shahat, and counts 2 through 4 charging violations by the licensee's employee or agent, Mena Farag. Count 5 charged a sale of alcohol to a minor under Business and Professions Code section 25658(a).

Administrative hearings were held on January 14, 2020, and July 28, 2020. Documentary evidence was received and testimony concerning the violations charged was presented by Department Agents Carlos Valencia, Salvador Zavala, and Edgardo Vega; the minor decoy, Spencer Pessis (the decoy); and the district asset protection manager for Food 4 Less, Ricardo Rojas. Morkos Shahat, President of appellant MES Western Liquor, Inc., and his employee, Mater Mousa, testified on appellant's behalf.

Counts 1 and 2:

Testimony established that the Department conducted an investigation at the licensed premises in response to complaints from the local sheriff's department

regarding stolen property. On August 1, 2018, Agent Valencia entered the licensed premises in an undercover capacity, carrying a backpack filled with a variety of distilled spirits. Each bottle had been marked "CVS" with a black light marker. The licensee, Morkos Shahat, and his employee, Mena Farag, were behind the counter. The agent purchased something from Farag, then asked him if he wanted to purchase some alcohol that his friend had stolen from a CVS warehouse. Agent Valencia put some of the bottles on the counter. Farag inspected them and conversed with Shahat in another language.

Agent Valencia offered to sell him the alcohol and told Farag the price. He also told him he had a case of Modelo beer in his trunk. They negotiated a bit, then Farag agreed to purchase one bottle of Grey Goose vodka, one bottle of Hennessy cognac, one bottle of Jack Daniels whiskey and the case of Modelo beer for \$50. The agent testified that the items had a retail value of \$102. Farag took \$50 from the register and paid for the alcohol. He asked Agent Valencia for Hennessy cognac in the future and Shahat indicated that he would like Patron tequila. (Findings of Fact (FF), ¶¶ 6-9.)

Count 3:

Agent Valencia returned to the licensed premises on August 7, 2018 with four bottles of distilled spirits. He offered to sell the alcohol to Farag, telling him they were stolen. After negotiating, Farag agreed to buy the four bottles plus a case of Modelo beer for \$70. Agent Valencia testified that the items had a retail value of \$140. Farag paid for the alcohol with money from the register. (FF ¶ 10.)

Count 4:

Agent Valencia returned to the licensed premises on August 8, 2018 with a case of Hennessy cognac. The bottles were marked with a circle and an X. Farag was

behind the counter talking to a customer. When he was free, Farag told Valencia to put the bottles in the back of a vehicle. They haggled about the price and Farag told Valencia that he had other contacts with similar goods. Agent Valencia said that his friend had stolen the cognac from CVS and that he had a case of Modelo as well which he retrieved from his vehicle. Farag put the Modelo behind the counter. They continued to negotiate and Farag stressed that his other contacts could get goods for less. They agreed on a price of \$215. Agent Valencia testified that the retail value was approximately \$444. Farag obtained the money from the register and paid Valencia. He also requested 20 cases of Hennessy. (FF ¶ 11.)

Agent Zavala entered the licensed premises, contacted Farag, and identified himself as a law enforcement officer. Farag denied purchasing any alcohol on August 1, 2018 or August 7, 2018. He admitted purchasing the cognac, which had been placed in his vehicle, and some beer, which he had placed in the stock room on August 8, 2018. Farag was arrested. (FF ¶ 12.)

Count 5:

On November 9, 2018, the decoy entered the licensed premises alone, followed shortly thereafter by Agent Vega in plain clothes. The decoy went to the cooler and selected two Bud Light beers. He took the beer to the counter and set it down. The clerk, Nater Mouse, rang up the sale without asking for identification and without asking any age-related questions. The clerk was on the phone the entire time the decoy was in the store.

The decoy exited the store with the beer, then re-entered with several agents. One of the agents asked him to identify the person who sold him the beer and he

pointed to the clerk. A photograph was taken of the decoy and clerk together (exh. 10) and the clerk was issued a citation. (FF ¶¶ 15-16.)

The administrative law judge (ALJ) issued a proposed decision on September 3, 2020. The Department considered but rejected the proposed decision and issued its own decision under Government Code section 11517(c) on April 12, 2021, dismissing count 1, sustaining counts 2 through 4, and instituting a penalty of revocation (stayed for a period of three years provided no further cause for discipline arises during that time) and a 20-day suspension for those counts. Count 5 was also sustained and a 15-day suspension was instituted for that count. The two suspension periods are to run consecutively.

Appellant then filed a timely appeal raising the following issues: (1) there is no substantial evidence to support a finding that appellant is legally liable for the expressly unauthorized acquisition of alcohol by its employee — which was acquired for the employee's own use, or for the actions of his employees when they were acting outside the scope of their employment, and (2) the penalty is excessive.

DISCUSSION

I

SUBSTANTIAL EVIDENCE & IMPUTED LIABILITY

Appellant contends the decision is not supported by substantial evidence. It maintains that its employee did not act in the scope of his employment, but rather purchased alcohol for his own use after being expressly told not to purchase alcohol. Appellant also contends that its other employee did not act in the scope of his employment when selling alcohol to a minor decoy. Therefore, it contends should not be held liable for its employees' rogue actions. (AOB at pp. 7-11.)

In determining whether a decision of the Department is supported by substantial evidence, this Board's review is limited to determining, in light of the entire administrative record, whether substantial evidence exists — even if contradicted — to reasonably support the Department's factual findings, and whether the decision is supported by those findings. (*Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113] (*Boreta*)). The Board is bound by the factual findings of the Department. (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1963) 212 Cal.App.2d 106, 113 [28 Cal.Rptr. 74] (*Harris*)). A factual finding of the Department may not be disregarded merely because a contrary finding would have been equally or more reasonable. (*Boreta, supra*, at p. 94.) The Board may not exercise independent judgment regarding the weight of the evidence; it must resolve evidentiary conflicts in favor of the Department's decision and view the whole record in a light most favorable to the decision. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].) The Board must accept all reasonable inferences from the evidence which support the Department's decision. (*Harris, supra*, at p. 113.)

“Substantial evidence” is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. N.L.R.B.* (1951) 340 U.S. 474, 477 [71 S.Ct. 456].)

Substantial evidence, of course, is not synonymous with “any” evidence, but is evidence which is of ponderable legal significance. It must be “reasonable in nature, credible, and of solid value; it must actually be ‘substantial’ proof of the essentials which the law requires in a particular case.” [Citations.] Thus, the focus is on the quality, not the quantity of the evidence. Very little solid evidence may be “substantial,” while a lot of extremely weak evidence might be “insubstantial.”

(*Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647] (*Toyota*).)

Subdivision (a) of Penal Code section 496 provides, in pertinent part:

Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, . . . shall be punished by imprisonment in a state prison, or in a county jail for not more than one year. . . .

Alleged by itself, section 496, subdivision (a), charges the crime of receipt of stolen property. Penal Code section 664, “which is a general section on attempts to commit crimes” (*People v. Siegel* (1961) 198 Cal.App.2d 676, 683 [18 Cal.Rptr. 268]), provides in pertinent part: “Every person who attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration, shall be punished where no provision is made by law for the punishment of those attempts, as follows: . . .” Combining section 664 with section 496, subdivision (a), results in a charge of attempted receipt of stolen property, as is charged in counts 1 through 4 of the accusation.

To illustrate, in *People v. Wright* (1980) 105 Cal App 3d 329, 332 [164 Cal.Rptr 207], the court found that the purchaser of a watch committed the offense of attempting to receive stolen property where an undercover agent who sold him the watch had represented it to be stolen, and where the purchaser believed he was purchasing stolen property — although in fact the watch had not been stolen, but had been purchased by the undercover agent. As the court explained, a person commits the offense of attempting to receive stolen property where he has the intent to commit the substantive offense, and, under the circumstances as he reasonably sees them, does the acts necessary to consummate the substantive offense — notwithstanding that, due to

circumstances unknown to him, there is an absence of one or more of the essential elements of the substantive crime. (*Wright, supra*, at p. 332.)

The facts in the instant case are similar to *Wright*, in that appellant's employee was told the alcohol he purchased was stolen. He had the requisite intent to commit the offense of receiving stolen property, and, under the circumstances as he reasonably saw them, did the acts necessary to consummate that offense by purchasing the alcohol at a greatly reduced price.

The purpose of Penal Code section 496 is to criminalize the receipt of stolen property. The legislature included the word *knowing* to eliminate the situation in which a person could not reasonably believe or know that the item was stolen, and was simply found to be in possession of such property. This is not such a case — Agent Valencia clearly told Farag on each occasion that someone had stolen the alcohol for him.

Appellant contends that Farag purchased the alcohol for his own consumption and had been expressly instructed not to purchase alcohol. (RT II, at pp. 23-24.) There is testimony in the record that this is what Farag told the arresting agent. (RT I, at pp. 59-60.) Therefore, appellant argues, responsibility for the actions of the employee should not be imputed to the licensee because Farag was not operating within the scope of his employment when he purchased the alcohol from Agent Valencia. Likewise, appellant argues that its employee Mousa was not operating within the scope of his employment when he sold alcohol to the minor decoy. (AOB at pp. 2;7.)

However, both this Board and the courts have consistently found that a licensee may be held liable for the actions of his agents or employees:

The owner of a liquor license has the responsibility to see to it that the license is not used in violation of law and as a matter of general law the knowledge and acts of the employee or agent are imputable to the licensee. [Citation.]

(*Harris v. Alcoholic Beverage Control Appeals Board* (1961) 197 Cal.App.2d 172, 180 [17 Cal.Rptr. 315].) The *Laube* court noted:

A licensee has a general, affirmative duty to maintain a lawful establishment. Presumably this duty imposes upon the licensee the obligation to be diligent in anticipation of reasonably possible unlawful activity, and to instruct employees accordingly.

(*Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779].) It is well-settled in alcoholic beverage case law that an agent or employee's on-premises knowledge and misconduct is imputed to the licensee/employer. (See *Yu v. Alcoholic Bev. Control Appeals Bd.* (1992) 3 Cal.App.4th 286, 295 [4 Cal.Rptr.2d 280]; *Kirby v. Alcoholic Bev. Control Appeals Bd.* (1973) 33 Cal.App.3d 732, 737 [109 Cal.Rptr. 291].)

In *Reimel v. Alcoholic Bev. Control Appeals Bd.* (1967) 252 Cal.App.2d 520, 522 [60 Cal.Rptr. 641].] the court found:

[A] licensee can draw no protection from his lack of knowledge of violations committed by his employees or from the fact that he has taken reasonable precautions to prevent such violations. 'There is no requirement . . . that the licensee have knowledge or notice of the facts constituting its violation.' [Citations.]

This principle has given rise to several corollaries noted by the court: a single act is sufficient to justify a suspension (*id.* at p. 523), wrongful acts by employees giving rise to a suspension need not be within the scope of employment (*ibid*), and, knowledge by employees of wrongful acts will be imputed to the licensee. (*id.* at p. 522; see also *McFaddin San Diego 1130, Inc. v. Stroh* (1989) 208 Cal.App.3d 1384, 1391 [257 Cal.Rptr. 8].)

The Department made the following finding in the decision about the appellant's knowledge of, and responsibility for, his employee's actions:

9. Importantly, while the evidence is insufficient to establish that Shahat personally purchased any purportedly stolen goods, it is clear that Shahat was aware of Farag's actions and, further, that his instructions to Farag not to buy anything were ineffective (e.g., he was present when Farag took possession of the case of Modelo beer on August 1, 2018, he suggested tequila for future transactions). Additionally, some of the purportedly stolen alcoholic beverages were located inside the Licensed Premises, both in the storeroom and on the shelves.

(Conclusions of Law, ¶ 9.) In short, appellant is responsible for Farag's actions because he knew, or should have known, what was transpiring in the premises.

Appellant argues that *Santa Ana Food Market, Inc. v. Alcoholic Beverage Control Appeals Board* (1999) 76 Cal.App.4th 570 [90 Cal.Rptr.2d 523] (Santa Ana) supports its argument that the acts of an agent or employee should not be imputed to his or her employer because, it argues, in both that case and the instant matter, the licensee took measures to deter criminal activity and was unaware of the employee's criminal act until after the fact. (AOB at p.14.) However, in *Santa Ana*, the court found an exception to imputed liability only in cases where there is "no per se nexus" between the licensee's sale of alcoholic beverages and the unlawful employee action. (*Id.* at p. 575.) Even then, the narrow exception applies only when the circumstances meet four required elements: 1) the employee commits a single criminal act unrelated to alcohol sales, 2) the licensee has taken strong steps to prevent and deter such crime before the criminal action took place, 3) the licensee is unaware of the criminal act beforehand, and 4) license discipline has no rational effect on public welfare or morals. (*Id.* at p. 576.) This case does not meet these four requirements.

Appellant has not established that the Department erred in imputing liability to it for the unauthorized misconduct of its employees. We find that the charges in counts 2 through 5 of the accusation are supported by substantial evidence. Accordingly, we must affirm the decision.

II

PENALTY

Appellant contends the penalty imposed is excessive and that the two periods of suspension, if sustained, should run concurrently rather than consecutively. (AOB at p. 17.)

The Board will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) “Abuse of discretion’ in the legal sense is defined as discretion exercised to an end or purpose not justified by and clearly against reason, all of the facts and circumstances being considered. [Citations.]” (*Brown v. Gordon* (1966) 240 Cal.App.2d 659, 666-667 [49 Cal.Rptr. 901].)

If the penalty imposed is reasonable, the Board must uphold it even if another penalty would be equally, or even more, reasonable. “If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within its discretion.” (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Rule 144 provides:

In reaching a decision on a disciplinary action under the Alcoholic Beverage Control Act (Bus. and Prof. Code Sections 23000, *et seq.*), and the Administrative Procedures Act (Govt. Code Sections 11400, *et seq.*), the Department shall consider the disciplinary guidelines entitled “Penalty Guidelines” (dated 12/17/2003) which are hereby incorporated by reference. Deviation from these guidelines is appropriate where the Department in its sole discretion determines that the facts of the particular

case warrant such a deviation - such as where facts in aggravation or mitigation exist.

(Cal. Code Regs., tit. 4, § 144.)

Among the mitigating factors provided by the rule are the length of licensure without prior discipline, positive actions taken by the licensee to correct the problem, cooperation by the licensee in the investigation, and documented training of the licensee and employees. Aggravating factors include, *inter alia*, prior disciplinary history, licensee involvement, lack of cooperation by the licensee in the investigation, and a continuing course or pattern of conduct. (*Ibid.*)

The Penalty Policy Guidelines further address the discretion necessarily involved in the Department's recognition of aggravating or mitigating evidence:

Penalty Policy Guidelines:

The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.

(*Ibid.*)

In the decision, the issue of consecutive rather than concurrent suspensions is addressed as follows:

The stolen property investigation concluded on August 8, 2018, with the final transaction occurring that day, followed by the arrest of Farag. The sale to minor violation occurred some three months later, on November 9,

2018. The purchase of purportedly stolen property and the sale of alcoholic beverages to a minor are completely separate and independent offenses. Moreover, the sale to the minor did not arise out of the prior stolen property investigation in any way. As such, it is appropriate for purposes of penalty determination to assess separate discipline to run consecutively rather than concurrently.

(Decision, at p. 8.)

As we have said time and again, this Board's review of a penalty looks only to see whether it can be considered reasonable, and, if it is reasonable, the Board's inquiry ends there, absent a clear showing of abuse of discretion. Appellant has not established that the Department abused its discretion in this case. Accordingly, the fact that the Department imposed consecutive rather than concurrent periods of suspension is entirely within its discretion.

ORDER

The decision of the Department is affirmed.²

SUSAN A. BONILLA, CHAIR
MEGAN McGUINNESS, MEMBER
SHARLYNE PALACIO, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

² This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.

APPENDIX

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

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

MES Western Liquor Inc.
dba Western Liquor
22300 Norwalk Blvd.
Hawaiian Gardens, California 90716

Licensee(s).

File No.: 21-565750

Reg. No.: 19088877

DECISION UNDER GOVERNMENT CODE SECTION 11517(c)

The above-entitled matter having regularly come before the Department on April 12, 2021, for decision under Government Code Section 11517(c) and the Department having considered its entire record, including the transcript of the hearing held on January 14 and July 28, 2020, before Administrative Law Judge Matthew G. Ainley, and good cause appearing, the following decision is hereby adopted:

Lisa Wong, Attorney, represented the Department of Alcoholic Beverage Control.

Joshua Kaplan, attorney-at-law, represented respondent MES Western Liquor Inc. Morkos Shahat, President of MES Western Liquor, was present.

The Department seeks to discipline the Respondent's license on the grounds that, on August 1, 2018, Morkos Shahat, at the Licensed Premises, bought, received, withheld, or concealed distilled spirits which he believed to have been stolen in violation of Penal Code sections 664/496(a). The Department further seeks to discipline the Respondent's license on the grounds that, on August 1, 2018, August 7, 2018, and August 8, 2018, Mena Farag, at the Licensed Premises, bought, received, withheld, or concealed distilled spirits which he believed to have been stolen in violation of Penal Code sections 664/496(a). (Exhibit 1.)

Finally, the Department seeks to discipline the Respondent's license on the grounds that, on or about November 9, 2018, the Respondent, through its agent or employee, sold,

furnished, or gave alcoholic beverages to Spencer Pessis, an individual under the age of 21, in violation of Business and Professions Code section 25658(a).¹ (Exhibit 1.)

FINDINGS OF FACT

1. The Department filed the accusation on May 28, 2019.
2. The Department issued a type 21, off-sale general license to the Respondent for the above-described location on March 30, 2016 (the Licensed Premises). The Respondent's sole shareholder and officer is Morkos E. Shahat.
3. There is no record of prior departmental discipline against the Respondent's license.
4. The Department submitted the disciplinary decision against license number 21-543242, owned by a person named Morkos E. Shahat for premises located at 13330 Meyer Rd., Whittier, California 90605-3546. That decision imposed a penalty of revocation stayed for three years coupled with a 20-day suspension based on the sale of drug paraphernalia by a clerk in violation Health & Safety Code section 11364.7(a). (Exhibits 2 & 4.) When the Department seeks an aggravated penalty based on a licensee's disciplinary history, it alleges such disciplinary history "for the purposes of aggravation of penalty, if any." The Department did not include any such allegation in this case.
5. The Department did not submit any evidence that the Morkos E. Shahat who holds license number 21-543242 is the same Morkos E. Shahat who owns the Respondent. Although the name is not a common one, the Department did not present any identifying information (e.g., birthdate, driver license number, photo, personal affidavit) indicating that they are one and the same, nor did it inquire about any other licenses which Shahat may hold when he testified in this case. Without such proof, it cannot be assumed that they are the same person.²
6. On August 1, 2018, Agent C. Valencia entered the Licensed Premises. He carried a backpack with a variety of distilled spirits which had been marked "CVS" with a blacklight marker. Morkos Shahat and Mena Farag were behind the counter.

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

² For example, it is not unusual for members of the same extended family to have the same name.

7. Agent Valencia purchased something from Farag, then asked him and Shahat if they wanted to purchase some alcohol which his friend had stolen from a CVS warehouse. Agent Valencia pulled a few bottles out of the backpack and placed them on the counter. Farag inspected the bottles, then had a conversation with Shahat in another language.

8. Agent Valencia offered to sell the alcohol and told Farag the price. Farag rejected the price, then negotiated for a bit. Agent Valencia told Farag that he had a case of Modelo beer in his trunk as well. Ultimately, Farag agreed to purchase one bottle of Grey Goose vodka, one bottle of Hennessey cognac, one bottle of Jack Daniels whiskey, and the case of Modelo beer for \$50. Agent Valencia testified that these items were worth \$102 at retail prices. Shahat did not participate in the discussions, nor did he give any money to Agent Valencia.

9. Farag obtained \$50 from the register and paid Agent Valencia. He asked Agent Valencia for Hennessey cognac in the future. Shahat indicated that he would like Patron tequila.

10. Agent Valencia returned to the Licensed Premises on August 7, 2018. He had four bottles of distilled spirits with him. He offered to sell the bottles to Farag, which he indicated were stolen. Agent Valencia and Farag negotiated for a bit, ultimately agreeing to a price of \$70 for the four bottles plus a case of Modelo beer. Agent Valencia testified that these items had a retail value of approximately \$140. Farag paid with money he obtained from the register.

11. Agent Valencia returned to the Licensed Premises on August 8, 2018. He had a case of Hennessey cognac, the bottles of which were marked with a circle and an "X." Farag was working behind the counter, dealing with a customer. When he finished, Farag told Agent Valencia to put the bottles in the back of a vehicle. Agent Valencia quoted Farag a price, which he rejected. They negotiated for a bit, during which Farag said he had other contacts with such goods. Agent Valencia said that his friend had stolen the cognac from CVS and that he had a case of Modelo as well. Agent Valencia retrieved the beer from his vehicle and gave it to Farag, who placed it behind the counter. Farag emphasized that his other contacts could get goods for less. They agreed upon a price of \$215; Agent Valencia testified that the retail value of the goods was approximately \$444. Farag obtained the money from the register and paid Agent Valencia. He also requested 20 cases of Hennessey.

12. Agent S. Zavala entered the Licensed Premises and contacted Farag. He identified himself as a law enforcement officer and said that they were following a person suspected

of selling stolen property. Farag denied purchasing any alcohol on August 1, 2018 or August 7, 2018. He admitted purchasing the cognac, which had been placed in his vehicle, and some beer, which he had placed in the stock room, on August 8, 2018. Farag was arrested.

13. Spencer Pessis was born on May 4, 2000. On November 9, 2018, he served as a minor decoy during an operation conducted by the Department. On that date he was 18 years old.

14. Pessis appeared and testified at the hearing. On November 9, 2018, he wore black shorts, a black t-shirt, black socks, and gray shoes. His hair was short and he was not wearing any jewelry or watches. (Exhibits 9-10.) At the hearing his appearance was the same except that his hair was a little longer.

15. On November 9, 2018, Pessis entered the Licensed Premises. Agent E. Vega followed. Pessis went to the cooler and selected two Bud Light beers. He took the beer to the counter and set it down. The clerk, Nater Mousa, rang up the sale without asking to see any ID or inquiring into Pessis' age. Pessis paid, then exited with the beer. Mousa was on the phone the entire time Pessis was inside the Licensed Premises.

16. Pessis re-entered the Licensed Premises with various agents. One of the agents asked him to identify the person who sold him the beer. He pointed to Mousa at a distance of three to four feet. A photo of the two of them was taken (exhibit 10), after which Mousa was cited.

17. Pessis appeared his age, 18 years old, at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in the Licensed Premises on November 9, 2018, Pessis displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Mousa.

18. Morkos Shahat testified that only he is authorized to purchase alcoholic beverages on behalf of the Respondent. He informed all of the employees of this fact, including Farag. Farag began working for the Respondent in 2016. Shahat told Farag, more than once, that if Farag needed anything he should let him know and that he would order it.

19. Shahat testified that, on August 1, 2018, he was only present for a few minutes after Agent Valencia entered with the alcohol. He testified that he told Farag not to buy alcohol from Agent Valencia.

20. A video of the August 1, 2018 transaction was shown during the hearing, covering a total of six minutes. (Exhibit B.) The transaction between Agent Valencia and Farag matches Agent Valencia's testimony. Shahat enters the frame about after approximately one minute, remains there for approximately two minutes, leaves, then re-enters two minutes later. He is on-screen for approximately one minute, during which Farag picks up the case of Modelo and turns toward Shahat.

21. Shahat was not present on August 7, 2018 or August 8, 2018. He testified that he did not learn of Farag's purchases on any of the three dates until after he was arrested. He denied reselling any of the alcohol which Farag purchased.³ He believed that Farag had purchased the alcohol for himself. Farag was terminated as a result of these incidents.

22. The Respondent has trained its employees not to sell to minors or to people who appear to be intoxicated. The Respondent's policy is to ask for ID from anyone who appears to be under the age of 30. The Licensed Premises has a machine which scans IDs. All employees have been instructed to use the machine when checking IDs.

23. Mousa was aware of the Respondent's policies and procedures for preventing sales to minors. On November 9, 2018, shortly before Pessis purchased the beer, his wife called because of his daughter's medical condition. He remained on the phone during the purchase. Shahat testified that Mousa's sale of beer to Pessis was an understandable mistake under the circumstances. Accordingly, Mousa is still employed at the Licensed Premises.

24. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

³ Exhibit 7 is a report prepared by Agent Reese, who did not testify. It was admitted as administrative hearsay. Consistent with the testimony of the various witnesses, the report indicates that the case of cognac was found in Farag's car and that various cases of Modelo were found in the storeroom. The report further indicates that, contrary to Shahat's testimony, some of other distilled spirits were located on shelves inside the Licensed Premises. Finally, the report indicates that some of the alcoholic beverages were not located.

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. Penal Code section 496(a) provides, in part, that it is illegal for anyone to buy or receive any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or conceal, sell, withhold, or aid in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained.
4. Penal Code section 664 provides, in part, that it is illegal for anyone to attempt to commit any crime, even if he or she fails, or is prevented or intercepted in its perpetration.
5. 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.
6. With respect to counts 2, 3, and 4, cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) on the basis that, on August 1, 2018, August 7, 2018, and August 8, 2018, the Respondent's employee, Mena Farag, inside the Licensed Premises, bought, received, withheld, or concealed distilled spirits which he believed to have been stolen in violation of Penal Code sections 664/496(a). (Findings of Fact ¶¶ 6-12 & 18-21.)
7. On all three dates, Agent C. Valencia offered to sell Farag alcoholic beverages which he clearly stated had been stolen. Each time, Farag negotiated a with Agent Valencia until a deeply discounted price was agreed upon for the alcoholic beverages in question. On all three dates, Farag paid for the purchase of the items with money obtained from the cash register. Finally, some of the alcohol was located inside the Licensed Premises, either in the stock room or on the shelves.

8. With respect to count 1, cause for suspension or revocation of the Respondent's license was **not** established. Although Shahat was present on August 1, 2018 when Agent Valencia and Farag were negotiating with each other—and was aware of the nature of the discussions—there is no evidence that Shahat participated in the negotiations. (Findings of Fact ¶¶ 6-8 & 18-21.)

9. Importantly, while the evidence is insufficient to establish that Shahat personally purchased any purportedly stolen goods, it is clear that Shahat was aware of Farag's actions and, further, that his instructions to Farag not to buy anything were ineffective (e.g., he was present when Farag took possession of the case of Modelo beer on August 1, 2018, he suggested tequila for future transactions). Additionally, some of the purportedly stolen alcoholic beverages were located inside the Licensed Premises, both in the storeroom and on the shelves.

10. With respect to count 5, cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) on the basis that, on November 9, 2018, the Respondent's employee, Nater Mousa, inside the Licensed Premises, sold an alcoholic beverage to Spencer Pessis, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 13-17 & 22-23.)

PENALTY

The Department requested that the Respondent's license be revoked for the stolen-goods counts and that it be suspended for 15 days for the sale-to-minor count. The Respondent did not recommend a penalty in the event that the accusation was sustained, other than to emphasize that the sale of alcohol to a minor was a mistake.

Under rule 144,⁴ the penalty for receiving stolen property on the Licensed Premises is revocation, if committed by the licensee, or revocation stayed for three years coupled with a 20-day suspension if committed by an employee. The penalty for the sale of alcoholic beverages to a minor is a 15-day suspension.

In the present case, the evidence was insufficient to establish that Morkos Shahat received any purportedly stolen property, but clearly established that Mena Farag, an

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

employee, did. Although the evidence did establish that Shahat was aware that Farag was purchasing purportedly stolen property, and even suggested tequila for a future transaction, which could be grounds to aggravate the discipline, on balance and in looking at the totality of circumstances, the lesser penalty under rule 144 is appropriate.

While there were some extenuating circumstances surrounding the sale of alcohol to a minor in this case, those do not excuse the sale. The better solution would have been for the clerk to take a break to discuss any distressing news. Any mitigation that may have existed is blunted by the short period of licensure prior to the instant violation (less than two years at the time of the sale).

The stolen property investigation concluded on August 8, 2018, with the final transaction occurring that day, followed by the arrest of Farag. The sale to minor violation occurred some three months later, on November 9, 2018. The purchase of purportedly stolen property and the sale of alcoholic beverages to a minor are completely separate and independent offenses. Moreover, the sale to the minor did not arise out of the prior stolen property investigation in any way. As such, it is appropriate for purposes of penalty determination to assess separate discipline to run consecutively rather than concurrently.

ORDER

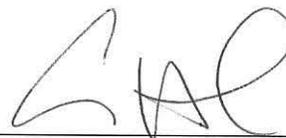
Count 1 is dismissed.

With respect to counts 2, 3, and 4, the Respondent's off-sale general license is hereby revoked, with the revocation stayed, upon the condition that no subsequent final determination be made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred within three years from the effective date of this decision; that should such determination be made, the Director of the Department of Alcoholic Beverage Control may, in his or her discretion and without further hearing, vacate this stay order and reimpose the stayed penalty; and that should no such determination be made, the stay shall become permanent. Additionally, the Respondent's license shall be suspended for a period of 20 days.

With respect to count 5, the Respondent's off-sale general license is suspended for a period of 15 days, to run consecutively to the suspension set forth in the preceding paragraph.

Sacramento, California

Dated: April 12, 2021



Eric Hirata
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.