

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

AB-9983

File: 21-576654; Reg: 22092752

AMY KIN NGHI,
dba Queen of Sheba
2286 35th Avenue
Oakland, CA 94601-3203,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: David W. Sakamoto

Appeals Board Hearing: February 9, 2024
Sacramento, CA/Videoconference

ISSUED FEBRUARY 14, 2024

Appearances: *Appellant:* Adam Koslin, of Solomon, Saltsman & Jamieson, as
counsel for Amy Kin Nghi, dba Queen of Sheba;

Respondent: Bryan Rouse, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

Amy Kin Nghi, doing business as Queen of Sheba (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending her license for 30 days because her clerk sold an alcoholic beverage to a person under the age of 21 years, in violation of Business and Professions Code² section 25658(a), and for failing

¹ The decision of the Department, dated July 25, 2023, is set forth in the appendix.

² All statutory references are to the Business and Professions Code unless otherwise stated.

to keep an executed application and acknowledgement for an employee or agent on the premises and available for inspection by the Department, in violation of section 25658.4(a)(3).

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on December 1, 2016. There are two prior instances of Departmental discipline against the license: 1) violation of section 25658(a) on December 9, 2021, and; 2) violations of sections 23403, 25170, 25171, and Health and Safety Code section 11377 on July 18, 2019.

On November 17, 2022, the Department filed the original accusation against appellant. The Department filed and served a First Amended Accusation on February 9, 2023, charging that, on May 20, 2022:

Count 1: appellant's agent or employee, "Max," sold, furnished, or gave an alcoholic beverage to 17-year-old M.S.,³ in violation of section 25658(a);

Count 2: appellant's agent or employee, Saleh Hassan ("Hassan") sold, furnished, or gave an alcoholic beverage to M.S., in violation of section 25658(a);

Count 3: Hassan permitted "Max" to be the sole person in charge of the licensed premises and to sell alcoholic beverages, in violation of section 24200(a);

Count 4: the Department made repeated requests to appellant for assistance in identifying "Max," which appellant failed to do, in violation of section 24200(a), and;

Count 5: appellant failed to keep an executed application and acknowledgement for "Max," in violation of section 25658.4(a)(3).

³ The Board will use M.S. to identify the minor since she was only 17 years old at the time of the violation.

At the administrative hearing held on March 7, 2023 and April 21, 2023, documentary evidence was received, and testimony concerning the sale was presented by: Ryan Swain, M.S., Eric Szakacs, Katrina Johnson, Billy Odesa, Alvoy Hives, Hassan, Ysef Ghazi, and Mohammed Masoud. Evidence established that on May 20, 2022, at approximately 7:10 p.m., Department agents Swain and Johnson went to the licensed premises due to complaints that minors were purchasing alcoholic beverages. Both agents were in plain clothes.

About ten minutes after they arrived, the agents observed three youthful persons entering the licensed premises: M.S., her eight-year-old brother, and an unidentified female friend of M.S. Agent Swain followed the trio into the licensed premises while Agent Johnson remained outside. When Agent Swain entered the licensed premises, he saw the trio at the sales counter.

Agent Swain saw M.S. engage with a male clerk who was standing behind the sales counter. The clerk began to scan some of the items the trio brought to the counter (chips, non-alcoholic drinks, and candy). M.S. then said something to the clerk, and the clerk turned around and obtained a 750 ml. bottle of Gran Centenario Tequila in a display carton from a rear shelf behind the sales counter that was out of public reach. The clerk scanned the bottle of tequila and M.S. paid the clerk in cash. The trio then left the licensed premises.

Agent Swain followed the trio outside the licensed premises and he and Agent Johnson detained them. The agents identified themselves as police officers. Agent Swain told M.S. he saw her purchase alcohol and asked to see her identification. M.S. indicated she was 18 years old but did not have any identification. M.S. told the agents she wanted to call her mother and the agents allowed her to do so. M.S.' mother

arrived at the scene and provided the agents M.S.' birthdate, which made her 17 years old. The agents cited M.S. for purchasing and being in possession of an alcoholic beverage and released her to her mother.

The agents then entered the licensed premises to continue their investigation. Inside, the agents met with Hassan, appellant's husband. Agent Swain identified himself to Hassan as a Department agent and asked him who the clerk was at the store. Hassan identified the clerk as, "Max." Hassan told Agent Swain he did not know Max's last name, he was not a premises employee, and he was helping while Hassan was down the street. Agent Swain did not see, meet, or have any conversation with any other employee other than Hassan. Agent Swain could not locate the clerk he witnessed sell the tequila to M.S. at the licensed premises.

In an effort to locate the salesclerk involved in the sale of tequila to M.S., Agent Johnson delivered a Notice to Produce (exh. 6) to the licensed premises on May 24, 2022. On or about June 2, 2022, appellant replied to the Department's request to produce, and indicated that only two people were working at the licensed premises on May 20, 2022: Hassan and Mohamed Moorab ("Moorab"). Agent Swain looked up both Hassan and Moorab in the California Department of Motor Vehicle records and neither were the male clerk he saw sell tequila to M.S..

Agent Swain sent an email to appellant on July 19, 2022 stating that neither of the two individuals she identified as working on May 20, 2022 were the individuals he observed sell alcohol to M.S.. Agent Swain asked if appellant would be able to help him identify the individual referred to as "Max." Appellant never responded to provide any further identity details regarding Max.

On December 30, 2022, Agent Johnson sent another Notice to Produce Records to appellant (exh. 9). Appellant, through her counsel, responded on January 20, 2023. Again, appellant provided identifying information for Hassan and Moorab. No information was provided regarding any person named or identified as “Max.”

Sometime after the sale, Supervising Agent Szakacs spoke with appellant regarding Agent Swain’s investigation. Appellant denied the violation occurred and said the seller was not her employee. Appellant stated her husband, Hassan, was working that day and neither she nor her husband know who “Max” was.

Agent Szakacs also testified that clerks at off-sale licensed premises are required by statute to fill out clerk’s affidavits. The affidavits are a method to make sure clerks are aware of some of the rules regarding alcoholic beverage sales and should be signed by the clerk and licensee before the clerk engages in selling alcoholic beverages. Clerks unknown to a licensee should not make sales of alcoholic beverages.

M.S. testified at the hearing and stated that she went to the licensed premises with her eight-year-old brother and a friend. M.S. testified that she stole the Gran Centenario tequila from her mother’s alcohol collection and carried that into the licensed premises. She denied purchasing the tequila at the licensed premises and stated that all she bought were chips, snacks, and sodas. M.S. stated that she goes to the licensed premises once or twice a week and is not familiar with any employee named “Max.” She did not recognize the clerk who handled her sale that day.

Several other customers who are familiar with the licensed premises testified that they do not know anyone named “Max” who works at the licensed premises. One

customer testified that the only “Max” he knows was a dog named Max, as seen in exhibit B.

On June 11, 2023, the administrative law judge (ALJ) issued a proposed decision sustaining counts 1 and 5 of the First Amended Accusation, and dismissing counts 2-4. The Department adopted the proposed decision on July 19, 2023, and issued a certificate of decision on July 25, 2023. Appellant filed a timely appeal contending that the Department erred in rejecting M.S.’ testimony.

DISCUSSION

Appellant contends the Department’s rejection of M.S.’ testimony was arbitrary and capricious and not supported by substantial evidence. (Appellant’s Opening Brief (AOB), at pp. 5-6.) Specifically, appellant argues that the Department’s rejection of M.S.’ testimony was “based on nothing more than ‘suspicion, imagination, speculation, conjecture, or guesswork.’” (*Id.* at p. 5.) Appellant also states that the Department had no other evidence to support its decision, namely, “a receipt [or] the testimony of another witness” (*Id.* at p. 6.)

In its decision, the Department made the following determination regarding M.S.’ testimony:

6. Respondent's witness, M.S., testified she took the boxed tequila from her mother and did not buy it at the licensed premises. Her testimony in that regard was not credible. She was a youthful 17-18 year old frequent customer at the licensed premises so had a motive not to get it in any trouble. M.S.'s eight year old brother liked to go to the licensed premises and she often accompanied him so she would want to maintain good relations with respondent. She told the agents at the scene she was 18 when she was only 17. By the time of the hearing, she received word her criminal citation was dropped so had no motive to testify against respondent. Further, at the scene of the investigation, she never told the ABC agents she did not buy the tequila at the licensed premises but took it from her mother's collection. M.S.'s mother was not called as a witness to corroborate whether she was missing such type of boxed tequila or testify

if M.S. ever told her she took the tequila from her. M.S.'s testimony regarding how and where she obtained the tequila was not credible.

(Determination of Issues, ¶ 6.)

The Department further found:

8. Agent's Swain's testimony as to what occurred was much more credible compared to respondent's witnesses' testimony. As such, there was sufficient evidence to sustain count 1 of the First Amended Accusation.

(Determination of Issues, ¶ 8.)

This Board is required to defer to the Department's findings so long as they are supported by substantial evidence. (See *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Southland)* (2002) 103 Cal.App.4th 1084, 1094 [127 Cal.Rptr.2d 652, 659] [citing *Kirby v. Alcoholic Beverage Control Appeals Bd.* (1968) 261 Cal.App.2d 119, 122 [67 Cal.Rptr. 628] ["In considering the sufficiency of the evidence issue the court is governed by the substantial evidence rule[;] any conflict in the evidence is resolved in favor of the decision; and every reasonably deducible inference in support thereof will be indulged. [Citations.]"; see also *Kirby v. Alcoholic Bev. etc. Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815] ["When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the department."].) "Substantial evidence" is "evidence of ponderable legal significance, which is 'reasonable in nature, credible and of solid value.'" (*County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 814 [38 Cal.Rptr.2d 304, 307–308], internal citations omitted.)

In its decision, the Department rejected M.S.' testimony in favor of Agent Swain's. (Determination of Issues, ¶¶ 6, 8.) The Department articulated its reasoning.

(*ibid.*) It is the province of the ALJ, as trier of fact, to make determinations as to witness credibility. (*Lorimore v. State Personnel Bd.* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].) "The trier of fact . . . is the sole judge of the credibility of the witnesses [and] may disbelieve them even though they are uncontradicted if there is any rational ground for doing so . . ." (*Pescosolido v. Smith* (1983) 142 Cal.App.3d 964, 970-971 [191 Cal.Rptr. 415].)

Here, there were rational grounds for the ALJ to disbelieve M.S.; she had ample motivation to lie, and in fact, did lie to agents about her age. It is also quite incredible that someone would bring a bottle of alcohol that they stole from home into a business establishment that sells that very same alcohol. In that vein, the Department was reasonable for rejecting M.S.' testimony in favor of Agent Swain and the other Department agents. For these reasons, the Department's decision must stand.

ORDER

The decision of the Department is affirmed.⁴

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

⁴ 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.

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. Service on the Board pursuant to California Rules of Court (Rule 8.25) should be directed to: 400 R Street, Ste. 320, Sacramento, CA 95811 and/or electronically to: abcboard@abcappeals.ca.gov.

APPENDIX

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

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

AMY KIN NGHI
QUEEN OF SHEBA
2286 35TH AVENUE
OAKLAND, CA 94601-3203

OFF-SALE GENERAL - LICENSE

Respondent(s)/Licensee(s)
Under the Alcoholic Beverage Control Act

CONCORD DISTRICT OFFICE

File: 21-576654

Reg: 22092752

CERTIFICATE OF DECISION

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on July 19, 2023. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. The appeal must be filed within 40 calendar days from the date of the decision, unless the decision states it is to be "effective immediately" in which case an appeal must be filed within 10 calendar days after the date of the decision. Mail your written appeal to the Alcoholic Beverage Control Appeals Board, 400 R St, Suite 320, Sacramento, CA 95811. For further information, and detailed instructions on filing an appeal with the Alcoholic Beverage Control Appeals Board, see: <https://abcab.ca.gov> or call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.

On or after September 5, 2023, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: July 25, 2023

RECEIVED

JUL 25 2023

Alcoholic Beverage Control
Office of Legal Services



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

Amy Kin Nghi
Dbas: Queen of Shiba
2286 35th Ave.
Oakland, CA 94601

Respondent

Regarding Her Type-21 Off-Sale General Retail
License Under the California Constitution and the
California Business and Professions Code

} File: 21-576654

} Reg: 22092752

} License Type: 21

} **PROPOSED DECISION**

} Hearing Date: 3/7/2023

} Court Reporter: Hannah Jenkin

} Word Count Estimate: 34,461

} Hearing Date: 4/21/2023

} Court Reporter: Tatiana Martindale

} Word Count Estimate: 9,936

Administrative Law Judge David W. Sakamoto, Administrative Hearing Office, Department of Alcoholic Beverage Control (hereafter the ALJ), heard this matter via video conference on March 7, 2023, and April 21, 2023.

Brian Rouse, attorney, Office of Legal Services, Department of Alcoholic Beverage Control, represented the Department of Alcoholic Beverage Control (hereafter the Department).

Adam Koslin, attorney, of Solomon, Saltsman, and Jamieson, represented licensee-respondent Amy Kin Nghi (hereafter respondent).

After testimony, documentary evidence, and evidence by stipulation on the record was heard and received at the hearing, the matter was argued by the parties and submitted to the ALJ for decision on April 21, 2023.

The Department's First Amended Accusation filed on February 9, 2023, alleged there was cause for suspension or revocation of respondent's license under California Constitution, article XX, section 22, and California Business and Professions Code section 24200, subdivision (a) and (b), based on the following grounds:¹

Count 1 alleged: "On or about May 20, 2022, respondent-licensee's agent or employee, "Max", at said premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: tequila, to M.S., a person under the age of 21 years, in violation of Business and Professions Code Section 25658(a)."

Count 2 alleged: "On or about May 20, 2022, respondent-licensee's agent or employee, Saleh Hassan, at said premises sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: tequila, to M.S., a person under the age of 21 years, in violation of Business and Professions Code Section 25658(a)."

Count 3 alleged: "On or about May 20, 2022, respondent-licensee's agent or employee, Saleh Hassan, permitted "Max" to be the sole person in charge of the licensed premises and to sell alcoholic beverages when "Max" was a person who respondent-licensee and Saleh Hassan were solely able to identify by a first name, in violation of Section 24200(a) of the Business and Professions Code."

Count 4 alleged: "On or about and between May 20, 2022, and December 30, 2022, the Department made repeated requests to respondent-licensee for assistance in identifying a person, known to the Department only as "Max", who was observed to sell alcohol to M.S. at the premises on May 20, 2022. Respondent-licensee has failed to assist the Department in identifying "Max", in violation of section 24200(a) of the Business and Professions Code."

Count 5 alleged: "On or about May 20, 2022, respondent-licensee failed to keep an executed application and acknowledgment for an employee or agent, "Max", on the premises and available for inspection by the Department, in violation of Business and Professions Code Section 25658.4(a)(3)."

¹ All further unspecified section references are to the California Business and Professions Code, unless noted otherwise.

FINDINGS OF FACT

1. The Department filed the original accusation on November 17, 2022. Thereafter, it received respondent's Notice of Defense and Special Notice of Defense that alleged certain affirmative defenses and a request for a hearing on the accusation. On February 9, 2023, the Department filed and served a First Amended Accusation. The respondent filed a Special Notice of Defense to the First Amended Accusation. The Department set the matter for a hearing. (Exhibit 1: pre-hearing pleadings.)
2. On December 1, 2016, the Department issued respondent a type-21 off-sale general license for her premises doing business as Queen of Shiba at 2286 35th Avenue, Oakland, California (hereafter the licensed premises).²
3. Respondent suffered the following disciplinary history under her license:

Date of Violation(s)	Section(s) Violated	Accusation Registration Date	Registration Number	Penalty Imposed
12/09/2021	Bus. & Prof. Code §25658(a)	01/19/2022	22091792	15 day suspension
07/18/2019	Health & Safety § 11377, Bus. & Prof. §§23403,25170,25171	07/17/2020	20090253	Revocation, stayed for 3 years and 30 day suspension

4. On May 20, 2022, at approximately 7:10 p.m., Alcoholic Beverage Control Agents Swain (hereafter Agent Swain) and Johnson (hereafter Agent Johnson) were at the licensed premises due to complaints the Department received regarding sales of alcoholic beverages to minors there.³ They were dressed in plain clothes.

² A type-21 license primarily permits the license holder to retail beer, wine, and distilled spirits to persons who are at least 21 years old for consumption off the licensed premises and minors are permitted to be on the licensed premises.

³ Both Agents Swain and Johnson testified at the hearing about their investigation at the licensed premises.

5. About 10 minutes after they arrived at the licensed premises, three youthful persons entered the licensed premises. The trio consisted of M.S, then 17 years old, her eight year old brother, and an unidentified black female friend of M.S. who was also approximately 17 years old.⁴ Agent Swain followed the trio into the licensed premises while Agent Johnson remained on the sidewalk.

6. Agent Swain observed the trio at the sales counter. He was approximately 10 feet from them and also on the customer side of the sales counter.

7. Agent Swain saw M.S. engage with a male clerk who was standing on a slightly raised platform behind the sales counter. The clerk began to scan some of the items the trio brought to the counter, i.e., chips, non-alcoholic drinks, and candy. M.S. spoke to the clerk. The clerk then turned about and obtained a 750 ml. bottle of Gran Centenario Tequila in a display carton from a rear shelf behind the sales counter area that was out of public reach. He pulled the item from the shelf and moved it to the sales counter area where he scanned it. The rear shelving was where distilled spirits and wine were normally on display. M.S. paid the clerk cash for the tequila along with the other items. The trio then left the licensed premises.

8. The salesclerk was a Middle Eastern appearing male, in his late 20s to early 30s. He appeared approximately 5'8" to 6'2" tall.

9. Agent Swain followed the trio outside the licensed premises and he and Agent Johnson detained them 30-90 seconds after their exit from the licensed premises. They were stopped 20-30 yards away from and across the street from the licensed premises.

10. Agent Swain and Agent Johnson identified themselves as police officers to the trio. Agent Swain told M.S. he had just seen her purchase alcohol and asked to see her identification. M.S. indicated she was 18 years old but did not have any identification with her. She indicated she wanted to call her mother. She called her mother who came to the scene. Her mother identified M.S. by name and provided her birthdate that made her 17 years old as of that day, not 18 years old.

11. M.S.'s young black female companion was holding the boxed bottle of tequila that she eventually surrendered to the agents. She also made a phone call. Not being involved in M.S.'s purchase of tequila, the agents did not identify her by name.

⁴ The minor's initials, M.S., were used in the accusation and this decision to help preserve her privacy. She appeared via video at the hearing and testified about this incident. Neither her 17 year old female companion, nor her mother, nor little brother testified at the hearing.

12. Within 3-4 minutes after the black female made her call, a car drove up containing people who she indicated were her family members. They exhibited a critical and agitated demeanor towards the two agents. They claimed the alcoholic beverages were for them. Agent Swain told the car's occupants the black female was not involved in this incident. Eventually, they drove off.

13. Sometime during Agent Swain's contact with the minors on the sidewalk, he saw respondent's clerk near the licensed premises doorway. The clerk looked in the direction of Agent Swain. Agent Swain did not say anything to the clerk at that time nor otherwise detain the clerk due to agent safety concerns based on the detaining of three minors and dealing with the agitated people in the car. He did not recall seeing where the clerk went.

14. Agent Swain issued M.S. a citation for being in possession of/purchasing an alcoholic beverage and released her at the scene to her mother.

15. The tequila M.S. purchased was Gran Centenario Tequila, an alcoholic beverage. (Exhibit 5: photo of the tequila) The 750 ml. tequila bottle was packaged in a dark colored display box. The box also contained a set of drink coasters that bore the Gran Centenario label.

16. After releasing M.S., Agent Swain and Agent Johnson entered the licensed premises to continue the investigation.

17. In the licensed premises, Agent Swain met only with respondent's husband, Selah Hassan (hereafter Hassan). Agent Swain identified himself to Hassan as police/ABC agent and asked him who the clerk was at the store. Hassan identified the clerk as "Max". Hassan told Agent Swain he did not know Max's last name, he was not a premises employee, and was helping while Hassan was down the street. Agent Swain did not see, meet, or have any conversation with any other employee other than Hassan. Agent Swain could not locate at the licensed premises the clerk he witnessed sell the tequila to M.S.

18. Agent Swain noticed a video surveillance system inside the licensed premises but Hassan indicated he could not access/operate it.

19. In an effort to locate the salesclerk involved in the sale of tequila to M.S., on May 24, 2022, Agent Johnson delivered to Haitham Mohammed Al Dhahery at the licensed premises a Notice to Produce (Exhibit 6: Notice to Produce). Agent Swain knew from a prior disciplinary action that Al Dhahery was not the same clerk who sold the tequila to M.S.

20. After stating its statutory authority, the Notice to Produce directed respondent to produce 1) all surveillance video for May 20, 2022, from 7:00 p.m. to 8:00 p.m.; 2) the names, dates of birth, and contact information for any employee who worked on May 20, 2022; and 3) Clerk Affidavits for any employee who worked on May 20, 2022. Respondent's response was due by June 3, 2022.

21. On or about June 3, 2022, respondent replied to the Department's Request to Produce as set out in Exhibit 7. Respondent's response indicated she wanted to cooperate with the Department's request. She indicated that on May 20, 2022, the only two persons working at the licensed premises were Saleh Hassan and Mohamed Moorab. She attached copies of their clerk's affidavits. She also explained her surveillance system's hard drive failed in April, that she ordered a replacement unit, and awaiting a technician to set it up. She attached a copy of the replacement surveillance system invoice.

22. Agent Swain looked up both identified employees Saleh Hassan and Mohamed Moorab in California Department of Motor Vehicle records and neither were male clerk he saw sell tequila to M.S. Agent Swain also saw Moorab testify at the hearing and in rebuttal, affirmed the clerk who sold tequila to M.S. was not Moorab, but appeared younger and had a different build than Moorab.

23. On July 19, 2022, Agent Swain sent a message to respondent that the person he saw sell to M.S. was neither of the two workers she identified. (Exhibit 8: email from Agent Swain to respondent). He told her that on May 20, 2022, he was advised by an employee the selling clerk was named "Max" and asked if respondent would be able to assist him in identifying "Max". Respondent never provided any further identity details regarding "Max".

24. On December 30, 2022, Agent Johnson sent respondent another Notice to Produce Records. (Exhibit 9: Request to Produce Records) It requested respondent produce by January 13, 2023, "The names, dates of birth and contact information for any employee, agent or any other person who had access to the register or performed any duties of an employee (including the involved person referred to as "Max"), present on the premises on 5/20/2022." Respondent was also requested to produce, "Clerk Affidavits for any employee on the premises on 5/20/2022." and "Sales transaction receipts from 5/20/2022."

25. On or about January 20, 2023, respondent, through her counsel, replied to the Department's Request for Production. (Exhibit 10: Respondent's response through her counsel). Respondent provided identifying information on its employees Saleh Hassan and Mohamed Moorab and included a copy of their Clerk's Affidavits. No information was provided regarding any person named or identified as "Max". The response also indicated that sales receipt information was not provided due to certain technical difficulties in retrieving the information. Only a partial sales summary for May 20, 2022, was provided.

26. On or about January 24, 2023, respondent, again through her counsel, provided a supplemental response to the Department's Request for Production. (Exhibit 11: Attorney response on behalf of respondent) This response included sales summaries for sales made on May 20, 2022. Respondent indicated that detailed transaction receipts could not be provided/printed out.

27. Sometime after May 20, 2022, Supervising Agent Szakacs spoke with respondent, Amy Nghi, regarding Agent Swain's investigation. Nghi denied the violation occurred and said the seller was not her employee. She said her husband, Saleh Hassan, was working that day. She said she and her husband did not know who "Max" was.

28. Agent Szakacs also testified that clerks at off sale licensed premises are required by statute to fill out clerk's affidavits. The affidavits are a method to make sure clerks are aware of some of the rules regarding alcoholic beverages sales and should be signed by the clerk and licensee before the clerk engages in selling alcoholic beverages. Clerks unknown to a licensee should not make sales of alcoholic beverages.

29. M.S. testified at the hearing. She testified that on May 20, 2022, she, her 8 year old brother, and a friend went to the licensed premises. She testified she had stolen the Gran Centenario tequila from her mother's alcohol collection and carried that into the licensed premises. She denied she purchased the tequila at the licensed premises and all she purchased there were chips, snacks, and sodas. She testified her little brother likes to go to the store so she goes there once or twice per week and was not familiar with any employee there called/named "Max". She did not recognize the clerk who handled her sale that day.

30. M.S. testified that as to the citation issued to her that day, she later received a letter indicating the case was being dropped. She had no pending or future court dates on the citation.

31. Billy Odesa, 21 years old, testified he is a resident in the area of the licensed premises. As a regular customer of the licensed premises, he was only aware of three clerks that work there, namely, Sal, Mohamed, and Haithem. He was not aware of any clerk known as "Max".

32. Alvoy Hives was familiar with the licensed premises as his wife and children frequently shopped there. He has never heard of any clerk there known as "Max". The only "Max" he was aware of was a dog there named "Max", as seen in Exhibit B, a photo of that dog.

33. Saleh Hassan (hereafter Hassan), husband of respondent Amy Kim Nghi, works at the licensed premises and was working there on May 20, 2022. He testified that at approximately 7:20 p.m. he left the licensed premises to meet with his brother concerning some rental properties they own in the area. He was away only 10-15 minutes before he returned to the licensed premises to continue working.

34. While he was temporarily absent from the licensed premises, Mohamed Moorab (hereafter Moorab) another clerk at the licensed premises, remained at the licensed premises. Only Moorab had permission to work there, including selling alcoholic beverages.

35. Hassan, Haithm Aldhaheri, and respondent Amy Nghi took the Department's Licensee Education on Alcohol and Drug (hereafter L.E.A.D.) on-line training program. (Exhibit H: LEAD Certificates) Respondent presented no certificate for Moorab.

36. Hassan testified he told the ABC agents on May 20, 2022, that only he and Moorab were working at the licensed premises accompanied by Hassan's dog named "Max".

37. Hassan testified they carry a variety of tequilas, including Gran Centenario. Their price for a 750ml bottle is \$39.99. The 375 ml. bottle costs \$26.99. They are displayed towards the back and middle of the store and kept on display shelves behind the sales counter out of public reach along with the wines and other distilled spirits. (Exhibit E: photo of section of rear shelf area behind counter) He added that to get most of the tequilas a ladder is needed to reach the appropriate shelves.

38. Hassan testified they carry a wide variety of tequilas, but do not display boxed tequilas because the boxes take up too much shelf space. They generally discard the box packaging and only display the bottles on the shelf.

39. Hassan added M.S. is a neighbor and shops at the licensed premises two to three times per week. She never tried to buy alcoholic beverages before.

40. As to the records of sales receipts, he testified the only records he could obtain were the sales summaries provided to the Department. He attempted to get more detailed records from respondent's point-of-sale vendor but said that due to a language barrier, communication with the vendor was not clear. Ultimately, that vendor told him all it would/could provide to him were sale summaries respondent turned over to the Department.

41. Mohamed Moorab testified through an interpreter that he has worked at the licensed premises for about six years. He still works at the licensed premises. On May 20, 2022, he was working at the licensed premises, the name "Max" meant nothing to him, and there was no employee there by that name. He did not recognize the photo of M.S. as shown in Exhibit 4. He did not recall any group of kids inside the licensed premises. He recalled when Hassan left the licensed premises for 5-10 minutes he remained at the licensed premises and was the only one who ran the sales register. He recalled the agents at the licensed premises but they did not speak to him at all. The licensed premises does not sell tequila that came with drink coasters.

42. Yousef Ghazi, an Oakland police officer and family friend of respondent, testified he heard about respondent having sold alcoholic or tobacco to a minor after the incident occurred. He advised respondent that if the buyer of alcohol or tobacco does not look at least 40 years old to just "card" them and be sure to check their height and weight against their appearance.

DETERMINATION OF ISSUES

1. Article XX, section 22, of the California Constitution and section 24200, subdivision (a), provide 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, subdivision (b), provides that a licensee's violation of or causing or permitting 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. Section 25658, subdivision (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.
4. As to Count 1 of the First Amended Accusation, there is cause for suspension or revocation of respondent's license under California Constitution, article XX, section 22 and section 24200, subdivision (a) and (b), because on May 20, 2022, respondent's agent or employee, identified only as "Max", upon the licensed premises, gave, sold or furnished an alcoholic beverage, to wit: a bottle of tequila, to M.S., a person under the age of 21, in violation of section 25658, subdivision (a).

5. The evidence established the agents were at the licensed premises due to complaints received about minors purchasing alcoholic beverages there. Agent Swain intentionally followed the youthful appearing trio inside the licensed premises. While standing only 10-15 feet from the trio of minors and focused on their actions, Agent Swain witnessed M.S. purchase the tequila from a middle eastern appearing man who was behind the sales counter. Agent Swain saw the clerk remove the boxed tequila from one of the rear shelves and scan that item. Respondent carried a wide variety of tequilas that were only displayed on shelving on the wall behind the sales counter out of public reach. Exhibit E, a photo of the rear shelf areas, shows some distilled spirits and/or wine appear displayed in display/gift boxes despite respondent's assertion they discard the boxes and only display the bottles to maximize display space. Agent Swain witnessed M.S. pay cash to the clerk for the tequila and other goods. The boxed tequila would not likely be confused for a bag(s) of chips, candy, or the soft drinks M.S. also purchased. Agent Swain was also certain the clerk he saw sell tequila to M.S. was neither Hassan, nor Moorab, nor Haitham Al Dhahery.

6. Respondent's witness, M.S., testified she took the boxed tequila from her mother and did not buy it at the licensed premises. Her testimony in that regard was not credible. She was a youthful 17-18 year old frequent customer at the licensed premises so had a motive not to get it in any trouble. M.S.'s eight year old brother liked to go to the licensed premises and she often accompanied him so she would want to maintain good relations with respondent. She told the agents at the scene she was 18 when she was only 17. By the time of the hearing, she received word her criminal citation was dropped so had no motive to testify against respondent. Further, at the scene of the investigation, she never told the ABC agents she did not buy the tequila at the licensed premises but took it from her mother's collection. M.S.'s mother was not called as a witness to corroborate whether she was missing such type of boxed tequila or testify if M.S. ever told her she took the tequila from her. M.S.'s testimony regarding how and where she obtained the tequila was not credible.

7. As to the identity of the seller in this instance, when Agent Swain contacted Hassan, the husband of the licensee, at the licensed premises, Hassan said he did not know "Max's" last name, he was not a premises employee, and was just watching the licensed premises while Hassan was down the street. The name "Max" was first mentioned by Hassan not Agent Swain. Agent Swain did not ask what Hassan's dog's name was but was directly inquiring about locating and identifying other clerks working at the licensed premises that day. There was no evidence presented Hassan mentioned to the agents at any time, even casually, that his dog had the same name as the "Max" who Hassan named as the person who helped out during Hassan's absence from the licensed premises. All through subsequent contacts and request for discovery and responses thereto where the Department sought information related to "Max", neither respondent nor Hassan ever brought up, even in a casual or informal manner, that Hassan's dog was also named "Max". Hassen's statements to Agent Swain made at the time of investigation that some person he identified as "Max" helped

watch the store while Hassan was briefly absent are considered much more reliable under totality of the circumstances.

8. Agent's Swain's testimony as to what occurred was much more credible compared to respondent's witnesses' testimony. As such, there was sufficient evidence to sustain count 1 of the First Amended Accusation.

9. As to Count 2 in the First Amended Accusation, there is no cause for suspension or revocation of respondent's license under California Constitution, article XX, section 22 and section 24200, subdivision (a) and (b), because it was not established that on May 20, 2022, respondent's agent or employee, Saleh Hassan, at said licensed premises, sold, furnished, or gave or caused to be sold, furnished, or given an alcoholic beverage, to wit: a bottle of tequila, to M.S., a person under the age of 21, in violation of section 25658, subdivision (a).

10. Firstly, the evidence did not establish Saleh Hassan directly sold, furnished, or gave tequila to M.S. He was neither the selling clerk nor even at the licensed premises when M.S. made her tequila purchase on May 20, 2023.

11. Secondly, the evidence established "Max" was the actual direct seller. However, that did not establish a separate cause of action under a theory that Hassan "...caused (an alcoholic beverage) to be sold, furnished, or given...to M.S...." The evidence indicated Hassan was not on the licensed premises when the sale occurred and played no direct role in M.S.'s transaction with "Max". For example, Hassan did not ring up the sale, specifically approve the sale to M.S., physically obtain the tequila from the shelf, or receive M.S.'s request for tequila. To find he "caused" the violation only because he left "Max" in charge of the store would be too broad an application of the term "caused" as used in section 26658, subdivision (a), as applied to the facts in this matter. Therefore, there was insufficient evidence to sustain count 2.

12. As to count 3 of the First Amended Accusation, there is no cause for suspension or revocation of respondent's license under California Constitution, article XX, section 22 and section 24200, subdivision (a) and (b).

13. Count 3 states: "On or about May 20, 2022, respondent-licensee's agent or employee, Saleh Hassan, permitted "Max" to be the sole person in charge of the licensed premises and to sell alcoholic beverages when "Max" was a person who respondent-licensee and Saleh Hassan were solely able to identify by a first name, in violation of Section 24200(a) of the Business and Professions Code."

14. Count 3 essentially alleged that on May 20, 2022, Hassan and respondent left a person they knew only by a first name in charge of the licensed premises to sell alcoholic beverages. While that would not likely be a prudent business practice, Count 3 did not allege such act was specifically banned under any statute or department rule such that, if violated, would be something contrary to public welfare and morals as specified in section 24200, subdivision (a). To establish such act now constituted a separate and distinct violation under section 24200, subdivision (a), would be improper and better left to statutory changes/amendments or department rulemaking. Although Count 3 did not state a proper cause of action to impose discipline, if, as occurred herein, the person respondent left to tend the licensed premises sold an alcoholic beverage to a minor in violation of section 25658, subdivision (a), respondent will/would be deemed accountable for that violation under section 24200, subdivision (a), and/or California Constitution, article XX, section 22 and subject to license suspension or revocation.

15. As to count 4 of the First Amended Accusation, there is no cause for suspension or revocation of respondent's license under California Constitution, article XX, section 22 and section 24200, subdivision (a) and (b).

16. Count 4 alleged: "On or about and between May 20, 2022, and December 30, 2022, the Department made repeated requests to respondent-licensee for assistance in identifying a person, known to the Department only as "Max", who was observed to sell alcohol to M.S. at the premises on May 20, 2022. Respondent-licensee has failed to assist the Department in identifying "Max", in violation of section 24200(a) of the Business and Professions Code."

17. In count 4, the Department essentially seeks to discipline respondent for failing to voluntarily assist it in further identifying "Max" even though respondent's position at the hearing was that they do not know who sold items to M.S. at the licensed premises on May 20, 2022. However, the Department cited no case, statute, rule, or precedential legal authority that expressly imposed a general legal duty on licensees to voluntarily assist the Department in its disciplinary investigations and that not doing so is grounds for license discipline under section 24200, subdivision (a). Also, in this matter, there was no allegation respondent did not produce records it must specifically keep and produce under the Department's statutes and rules as described in section 25616. There was no allegation respondent resisted, obstructed or delayed the agents in the discharge or attempt to discharge their duties as set out in Penal Code section 148. There was neither evidence the Department, during its follow up investigation, sought to visit and inspect the licensed premises to perform its duties but were refused entry by respondent nor evidence the Department went to the licensed premises to make its own search/examination of respondent's books and records as described in section 25753 and 25755. The Department did not allege any of the aforementioned sections were violated. In the absence of definitive

legal authority that respondent had a duty to voluntarily aid the Department in its disciplinary investigation and exceed what existing statutes and rules required, count 4 did not state an adequate cause of action so as to warrant license discipline under authority of section 24200, subdivision (a) and/or article XX, section 22 of the California Constitution.

18. As to count 5 of the First Amended Accusation, there is cause for suspension or revocation of respondent's license under California Constitution, article XX, section 22 and section 24200, subdivision (a)-(b).

19. Count 5 alleged: "On or about May 20, 2022, respondent-licensee failed to keep an executed application and acknowledgment for an employee or agent, "Max", on the premises and available for inspection by the Department, in violation of Business and Professions Code Section 25658.4(a)(3)."

20. Section 25658.4 generally specifies no clerk shall make an off sale of alcoholic beverages unless the clerk executes on the first day of that sale an application and acknowledgment in the form specified by the Department. That form, as Agent Szakacs described and that section requires, includes some information on the basic rules and regulations regarding lawful retailing of alcoholic beverages. Under that section, the licensee is obligated to keep the form, signed by the employee and licensee, on the licensed premises at all times and available for the Department's inspection. The section contains further details regarding options for storing the affidavits for licensees having multiple locations. Violation of this subdivision is grounds for license discipline.

21. In this instance, the Department sent requests to respondent for the affidavit regarding or relating to the person identified to it by Hassan as "Max". Respondent never produced to the Department for inspection/review any affidavit for "Max". As Hassan told Agent Swain that "Max" was not an employee and just watching the licensed premises during Hassan's brief absence, that might explain why respondent has no affidavit for him as respondent and/or Hassan did not consider "Max" a formal employee. Respondent produced affidavits for Mohamed Moorab and Saleh Hassan. As it is determined there was sufficient evidence to sustain Count 1, then as to that clerk, identified by Hassan as "Max" or whatever his true and full name was, respondent should have had a completed affidavit signed by him prior to his engaging in alcoholic beverages sales at the licensed premises. Respondent not having an affidavit for "Max" for the Department's inspection, a violation of section 25658.4 was established. The evidence supported sustaining count 5.

PENALTY

1. The Department's penalty guidelines are in California Code of Regulations, title 4, section 144 (hereafter rule 144). Under rule 144, the penalty for a first time violation of section 25658 is a 15 day license suspension. If there is a second section 25658 violation within the following 36 months, then a 25 day license suspension is specified. If there is a third section 25658 violation within 36 months of the first section 25658 violation, then license revocation is to be imposed.
2. Rule 144 has no recommended penalty for violation of section 23958.4 regarding obtaining clerk's affidavits and their retention. It appears a penalty of a 5 day suspension would be an appropriate presumed penalty absent factors in aggravation or mitigation.
3. Rule 144 also states aggravating and mitigating factors can be considered in determining an appropriate penalty. Rule 144 includes a non-exhaustive list of some of those variables. Aggravating factors include, but are not limited to, such things as prior disciplinary history, prior warning letters, licensee involvement, premises located in high crime area, lack of licensee cooperation in the investigation, appearance and age of minor, and a continuing course of conduct. Mitigating factors include, but are not limited to, such things as the duration of discipline free licensure, action taken to correct the problem, licensee training, and cooperation by a licensee in the investigation.
4. The Department argued, among other things, the evidence supported sustaining each count in the First Amended Accusation. If all counts were sustained, the Department recommended a 35 day suspension.
5. Respondent argued, among other things, there was no sale of any tequila to M.S. but that she brought it from home and did not obtain it at the licensed premises. Therefore, all counts should be dismissed.
6. The evidence warranted sustaining only count 1 and 5 of the accusation. However, as to count 1, as that will be respondent's second section 25658 violation within 36 months of its first section 25658 violation, rule 144 calls for a 25 day suspension. Rule 144 lists the appearance and age of the minor as an aggravating factor. M.S. was only 17 years old and appeared quite youthful. M.S. was in a youthful trio including her 8 year old brother and a female companion also about 17 years old. There was no evidence "Max" asked M.S. for identification or otherwise sought to verify she was at least 21 years old at the time of sale. Rule 144 list prior disciplinary history as a factor in aggravation. This will be the respondent's third disciplinary matter since 2019. While rule 144 lists "Lack of cooperation by licensee in investigation" as a factor in aggravation, as explained above, to the extent the Department sought to aggravate the penalty based on respondent's failure to assist it in its

disciplinary investigation when no such duty was established, it similarly could not, in this instance, be applied as a factor in aggravation either.⁵

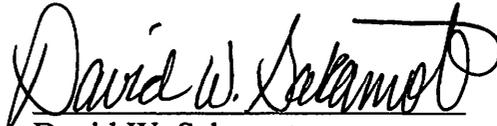
7. Aldhaferi, Saleh Hassan, and respondent Amy Nghi took the Department's Licensee Education on Alcohol and Drug class. Respondent posted signs indicating customers' identifications will be checked for sales of alcoholic beverages.

8. The penalty ordered below is the result of considering the penalties and factors in rule 144, the evidence, and the parties' arguments at the hearing.

ORDER

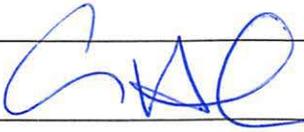
1. Count 1 of the First Amended Accusation is sustained and respondent's license is suspended for 30 days.
2. Count 2 of the First Amended Accusation is dismissed.
3. Count 3 of the First Amended Accusation is dismissed.
4. Count 4 of the First Amended Accusation is dismissed.
5. Count 5 of the First Amended Accusation is sustained and respondent's license is suspended for 5 days which shall be served concurrently with the penalty imposed for count 1 of the First Amended Accusation.

Dated: June 11, 2023


David W. Sakamoto
Administrative Law Judge

⁵ There may be a set of facts and circumstances where under rule 144 "Lack of cooperation by licensee in investigation" would be an appropriate factor in aggravation to consider.

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____

By: _____ 
Date: _____ 