

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

AB-9071

File: 21-421039 Reg: 08068908

NAV FOOD STORE LLC, dba Harry's Liquor & Food
10847 Folsom Boulevard, Rancho Cordova, CA, 95670
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

Appeals Board Hearing: April 7, 2011
San Francisco, CA

ISSUED APRIL 28, 2011

Nav Food Store LLC, doing business as Harry's Liquor & Food (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 25 days for its clerk selling an alcoholic beverage to a person under the age of 21, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Nav Food Store LLC, appearing through its counsel, Ralph B. Saltsman and Soheyl Tahsildoost, and the Department of Alcoholic Beverage Control, appearing through its counsel, Heather Hoganson.

¹The decision of the Department, dated September 30, 2009, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on March 8, 2005. On May 4, 2008, the Department filed an accusation charging that appellant's clerk, Nav Deep Singh (the clerk), sold an alcoholic beverage to 19-year-old Arnulfo Ramirez-Zarazua (Zarazua) on April 2, 2008.

At the administrative hearing held on June 3 and July 13, 2009, documentary evidence was received and testimony concerning the sale was presented by Zarazua, by Department investigator Bret Ajax, and by the clerk. Nav Preet Singh, brother of clerk Nav Deep Singh, also testified.²

Investigator Ajax entered appellant's licensed premises on April 2, 2008. Zarazua was a patron at the counter and Nav Deep Singh was the sales clerk on the other side of the counter. Zarazua walked out of the store with a 12-pack of Budweiser beer and Ajax followed him outside. There Ajax stopped Zarazua and determined that he was 19 years old. His age and identity were confirmed by a Mexican Matricula Consular card. Ajax searched Zarazua, but found no false identification. Zarazua told Ajax that the clerk had not requested identification before selling the beer to him.

When Ajax and Zarazua re-entered the store, the clerk told Ajax he had sold the beer to Zarazua because when asked how old he was, Zarazua said he was 21. The clerk said he did not request Zarazua's identification.

At the hearing, Zarazua testified that he had been in appellant's licensed premises before, but had not attempted to purchase an alcoholic beverage before April 2, 2008. He also testified that he had never possessed false identification.

²The owner of the corporate licensee is the father of Nav Deep Singh and Nav Preet Singh. The father and the two brothers are the only clerks at the licensed premises. [RT 53.]

The clerk testified that he sold the beer to Zarazua without asking for identification because he had checked Zarazua's identification on the three or four occasions before April 2, 2008, when Zarazua had purchased alcoholic beverages. He testified that the identification shown to him on those previous occasions was a Mexican ID card showing Zarazua to be 21 years old.

Nav Preet Singh, the brother of clerk Nav Deep Singh and also a clerk at the licensed premises, testified that he sold beer to Zarazua on seven or eight prior occasions. He stated that he had checked Zarazua's ID the first three or four times he sold to him, that the description on the ID matched Zarazua's appearance, and that the ID showed Zarazua to be 21 years of age or over.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established.

Appellant has filed an appeal contending that (1) it established a defense under Business and Professions Code section 25660, and (2) the decision failed to adequately account for all mitigating factors presented at the hearing.

DISCUSSION

I

Business and Professions Code section 25660 provides an affirmative defense to the unlawful sale of an alcoholic beverage to a person under the age of 21. The defense is available if the licensee proves that the seller "demanded, was shown, and acted in reliance upon" "bona fide evidence of majority and identity of the person" purchasing alcoholic beverages.

Bona fide evidence of majority and identity of the person is a document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a motor vehicle

operator's license or an identification card issued to a member of the Armed Forces, that contains the name, date of birth, description, and picture of the person.

(Bus. & Prof. Code, § 25660, subd. (a).)

Appellant contends that the testimony of Nav Deep and Nav Preet Singh established the defense under section 25660.

To establish a defense under section 25660, a licensee must establish that an identification document which purported to be issued by a government agency was displayed and examined and that the clerk's reliance on that identification was reasonable. (*Dept. of Alcoholic Bev. Control v. Alcoholic Beverage Control Appeals Bd.* (2004) 118 Cal.App.4th 1429 [13 Cal.Rptr.3d 826] (*Masani*).) The burden in such a case is on the party asserting the defense.

Appellant contends that the ALJ gave no weight to the testimony of the Singh brothers, but "stretche[d], twist[ed], and misconstrue[d] the record to produce a Decision that is favorable to the Department." (App. Opening Br. at p. 8.) At oral argument, appellant argued the ALJ's disregard of the brothers' testimony was "the crucial reason" for rejecting its assertion of the section 25660 defense.

It is clear the ALJ found the Singhs' testimony to be less credible than that of Zarazua. It is the province of the ALJ, as trier of fact, to make determinations as to witness credibility. (*Lorimore v. State Personnel Board* (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 Appeals Board will not interfere with those determinations in the absence of a clear showing of an abuse of discretion.

Appellant "stretched, twisted, and misconstrued" the ALJ's statement regarding the affirmative defense, but its attack on the ALJ's determination fails to show any

abuse of discretion. Contrary to appellant's assertion at the hearing, the ALJ's rejection of the brothers' testimony was not crucial to rejection of the defense, but just one of the three reasons listed in Determination of Issues, paragraph 9.

The primary reason for rejecting the section 25660 defense was the failure to produce the alleged false identification at the hearing. The Appeals Board has confronted this situation before, where reasonable reliance on identification has been asserted, but the identification itself has not been produced. It has consistently rejected a section 25660 defense under these circumstances, as explained in *Circle K Stores, Inc.* (2003) AB-8116:

Even if the minor had admitted that he possessed false identification, the absence of any evidence of what it might have been dooms appellant's section 25660 defense. With no opportunity to view the supposed false identification, neither the ALJ nor this Board could make any assessment whatsoever as to whether a clerk may have reasonably relied upon it.

(*Accord, 7-Eleven, Inc. & Waraich* (2010) AB-9055; *Fulton & Fulton, Inc.* (2008) AB-8638; *Circle K Stores, Inc.* (2001) AB-7701.)

This failure of proof would be sufficient in itself to make the defense unavailable to appellant. The ALJ did not abuse his discretion in finding that appellant failed to establish a section 25660 defense.

II

Appellant contends that the Department is required by Department rule 144 (Cal. Code Regs., tit. 4, § 144) to consider the mitigation factors it presented at the hearing, but that it failed to do so. It asserts that the decision must be reversed because the Department failed to comply with its own penalty guidelines.

Appellant does not argue that the penalty is excessive, presumably to avoid the well-established rule of law that the Department has great discretion in making a

penalty determination. The Appeals Board will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) 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 the area of its discretion." (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1965) 62 Cal. 2d 589, 594 [43 Cal.Rptr. 633].) Even if the Board were to find that the penalty was an abuse of discretion, the remedy would be to remand the matter to the Department, not to reverse the decision.

Appellant bases its argument on the principle that an agency is bound by its own properly promulgated rules. If it fails to follow those rules, it has not proceeded in the manner required by law.³ (*Talmo v. Civil Serv. Com* (1991) 231 Cal.App.3d 210, 218 [282 Cal.Rptr. 240]; *Bonn v. California State University, Chico* (1979) 88 Cal.App.3d 985, 990 [152 Cal.Rptr. 267].) If the Department has not proceeded in the manner required by law, reversal of the Department's decision is usually the appropriate remedy.

Appellant relies for its position on language in rule 144 that states "the Department shall consider the disciplinary guidelines entitled "Penalty Guidelines," placing emphasis on the word "shall." The decision states, in its discussion of penalty considerations, that "the Respondent did not present any mitigating circumstances." (Decision at p. 6.) This statement, appellant asserts, shows that mitigating factors in the record were not considered and, therefore, rule 144 was violated.

³This is one of the questions the Appeals Board has authority to consider under Business and Professions Code section 23084.

The "mitigating evidence" appellant contends was ignored is what appellant calls its "new store policy" that "prohibits the clerks from relying on the prior display of identification and instead requires the clerks to always ask for and check identification where appropriate." According to appellant, this is a "Positive action by licensee to correct problem," one of the mitigating factors listed in rule 144.

Primary among the several problems with appellant's argument is appellant's failure at the hearing to identify this "new store policy" as a mitigating factor. Although appellant does not tell the Board where in the transcript this evidence occurs, the Department points out the testimony of Nav Deep Singh on pages 58 and 59 of the transcript:

Q. [by appellant's attorney, Mr. Kroll] Since this incident, since April 2nd, 2008, have you changed your policy any way at the location?

A. Yes. Now we check it every day no matter if people fight me.

Q. You're saying you check everyone's ID no matter what?

A. No matter what.

* * * *

Q. Is that still a policy you have today?

A. Yes.

The efficacy of the "new store policy" was revealed a short time later during the testimony of the other Singh brother, Nav Preet, at page 67 of the transcript:

Even now regular customers I don't check their ID every day. I have customers that come in the store twice a day. I don't check their ID twice a day.

Except for the few sentences during the testimony of Nav Deep Singh, the "new store policy" is never mentioned again at the hearing. Appellant's counsel did not

mention it as a mitigating factor during closing argument. Counsel said only that "if for whatever reason this accusation is sustained here, [there] was not aggravation." [RT 75.]

In spite of appellant's failure to put the ALJ on notice that the "new store policy" should be considered as a mitigating factor, the ALJ acknowledged Nav Deep's testimony by including in Finding of Fact 10 the statement that "Harry's has changed this 'policy,' and now they ask for identification every time a customer purchases alcoholic beverages." (Dec. at p. 3.) Since the ALJ did not ignore the "new store policy" but said that appellant "did not present any mitigating circumstances," we can only conclude that he did not consider the "new store policy" to constitute a mitigating circumstance.

Contrary to appellant's assertion, the Department is not *required* to consider appellant's "new store policy" as a mitigating factor. The sentence from rule 144 that appellant chooses not to quote states that "[d]eviation from these guidelines is appropriate where the Department *in its sole discretion* determines that the facts of the particular case warrant such a deviation." (Italics added.) The "Penalty Policy Guidelines" in the Appendix to rule 144 state, in part (italics added):

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*.

Higher or lower penalties from this schedule *may* be recommended based on the facts of individual cases where generally supported by aggravating or mitigating circumstances.

¶ . . . ¶

- Mitigating factors *may* include, but are not limited to:
- (1) Length of licensure at subject premises without prior discipline or problems
 - (2) Positive action by licensee to correct problem
 - (3) Documented training of licensee and employees
 - (4) Cooperation by licensee in investigation

While the Department is bound by its own regulations, rule 144 does not in any way restrict the Department's proper exercise of its discretion. Rule 144 also does not change the scope of this Board's review of penalties imposed by the Department. As long as the penalty imposed is reasonable, the Board will uphold it. The penalty imposed here was the standard one for a second sale-to-minor violation within 36 months. Appellant has not persuaded us that it was an abuse of discretion for the Department to impose the standard penalty.

ORDER

The decision of the Department is affirmed.⁴

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
MICHAEL A. PROSIO, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴This 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.