

ISSUED MARCH 5, 1996

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

| | | |
|-----------------------------|---|--------------------------|
| NAZAR F. YONO |) | AB-6511 |
| dba Xpress Food |) | |
| 640 E Street |) | File: 21-295192 |
| Chula Vista, CA 91910 |) | Reg: 94030536 |
| Appellant/Licensee |) | |
| |) | Administrative Law Judge |
| v. |) | at the Dept. Hearing: |
| |) | James Ahler |
| THE DEPARTMENT OF ALCOHOLIC |) | |
| BEVERAGE CONTROL, |) | Date and Place of the |
| Respondent. |) | Appeals Board Hearing: |
| |) | January 11, 1996 |
| |) | Los Angeles, CA |

Nazar F. Yono, doing business as Xpress Food (appellant), appealed from a decision of the Department of Alcoholic Beverage Control¹ which suspended appellant's off-sale general license for ten days for appellant's clerk having sold an alcoholic beverage to a nineteen-year-old minor decoy, in violation of Business and Professions Code §25658(a).

Appearances on appeal included Alejandro Matuk, counsel for appellant; and David Wainstein, counsel for the department.

FACTS AND PROCEDURAL HISTORY

¹The department's decision dated January 26, 1995 is set forth in the appendix.

Appellant's license was issued on May 20, 1994. On August 18, 1994, the department instituted an accusation alleging that on June 23, 1994, appellant's clerk sold an alcoholic beverage to a minor.

An administrative hearing was held on December 29, 1994, at which time oral and written documentation was presented. Thereafter, the department issued its decision which was adverse to appellant, who subsequently filed a timely notice of appeal.

DISCUSSION

In his appeal, appellant contended that the penalty was excessive, as the sale was a honest mistake by the clerk.²

From the arguments before the appeals board, there appears to be some confusion concerning the role of the appeals board and the power of the department. It is the department which is authorized by the California Constitution to exercise its discretion whether to suspend or revoke an alcoholic beverage license, if the department shall reasonably determine for "good cause," that the continuance of such license, would be contrary to public welfare or morals.

The scope of the appeals board's review is limited by the California Constitution, by statute, and by case law. In reviewing a department's decision, the appeals board may not exercise its independent judgment on the effect or weight of the evidence, but

²At the appeals board's oral argument hearing, the department's counsel stated that if the appeals board sustained the appeal, appellant, as provided by statute, could petition to the department to pay a fine in lieu of serving a suspension.

is to determine whether the findings of fact made by the department are supported by substantial evidence in light of the whole record, and whether the department's decision is supported by the findings.³

The appeals board will not disturb the department's penalty orders in the absence of an abuse of the department's discretion (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287, 341 P.2d 296). However, where an appellant raises the issue of an excessive penalty, the appeals board will examine that issue (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785, 97 Cal.Rptr. 183).

In assessing the penalty, the department had the following factors to consider: (1) Justin Jacob Schaeffer, the minor who was working under the control of the Chula Vista Police Department, entered the premises on June 23, 1994, obtained a 64-ounce bottle of Mickey's Fine Malt Liquor, and took the bottle to the clerk [R.T. 8, 9, 11, 13-14]. The clerk requested identification from the minor and was shown a California driver's license which had a notation in red lettering: "Age 21 in 1995." The clerk looked at the license, handed the license back to the minor, and completed the sale [R.T. 15-17]; (2) the clerk testified that she misread a calculation of age form which was attached to the cash register [R.T. 22]; (3) the responsibility is upon a licensee not to sell alcoholic beverages to a minor (Munro v. Alcoholic Beverage Control Appeals Board & Moss (1957) 154 Cal.App.2d 326, 316 P.2d 401; and Mercurio v.

³The California Constitution, Article XX, Section 22; Business and Professions Code §§23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85, 84 Cal.Rptr. 113.

Department of Alcoholic Beverage Control (1956) 144 Cal.App.2d 626, 301 P.2d 474; (4) before a sale is made of an alcoholic beverage, it is the responsibility of the seller to determine the true age of the customer who is offering to purchase the alcoholic beverage (Business and Professions Code §25658(a)); and (5) a licensee is vicariously responsible for the unlawful on-premises acts of his employees. Such vicarious responsibility is well settled by case law (Harris v. Alcoholic Beverage Control Appeals Board (1962) 197 Cal.App.2d 172, 17 Cal.Rptr. 315, 320; Morell v. Department of Alcoholic Beverage Control (1962) 204 Cal.App.2d 504, 22 Cal.Rptr. 405, 411; and Mack v. Department of Alcoholic Beverage Control (1960) 178 Cal.App.2d 149, 2 Cal.Rptr. 629, 633.

CONCLUSION

The decision of the department is affirmed.⁴

RAY T. BLAIR, JR., CHAIRMAN
JOHN B. TSU, MEMBER
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴This final order is filed as provided by Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.