ISSUED MARCH 5, 1996

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

KDM ENTERTAINMENT, INC. dba Kokomo's 17927 MacArthur Blvd. Irvine, CA 92714, Appellant/Licensee, v. THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6531 File: 47-185953 Reg: 94030413 Administrative Law Judge at the Dept. Hearing: James Ahler Date and Place of the Appeals Board Hearing: January 11, 1996 Los Angeles, CA

KDM Entertainment, Inc., doing business as Kokomo's (appellant), appealed from a decision of the Department of Alcoholic Beverage Control[1] which suspended appellant's on-sale general public eating-place license for 30 days for appellant's employees having furnished alcoholic beverages to two minors, in violation of Business and Professions Code section 25658(a).

Appearances on appeal included Michael W. Champ, Mark H. Herskovitz, and Joey P. Moore, counsel for appellant; and Jonathon E. Logan, counsel for the department.

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[1]The decision of the department dated April 13, 1995 is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on August 21, 1986. Thereafter, the department instituted an accusation on July 28, 1994, alleging that appellant's employees had served alcoholic beverages to two minors.

An administrative hearing was held on February 28 and March 1, 1995, at which time oral and documentary evidence were received. At that hearing, it was determined that appellant operated a nightclub providing a disc jockey, entertainment, dancing, and three full-service bars and one bottled-beer bar. The premises occupied two floors of the building. Apparently patrons were divided into two lines for entry: those over the age of 21 years and those under the age of 21 years (persons below 18 years were not admitted).

Those patrons over the age of 21 years would have a band placed on their wrist with a black stamp placed on their hand. Those under 21 years received only a fluorescent stamp on their hand.

The two minors concerned in this review entered the premises after having their hands stamped, and sat at a table with friends they accompanied to the premises. Two of the friends were over age 21. During the evening, alcoholic beverages were served to the members of the group.

Subsequent to the hearing, the department issued its decision, which suspended appellant's license for 30 days. Appellant filed a timely notice of appeal.

In its appeal, appellant raised the following issues: (1) the crucial findings were not supported by substantial evidence, and (2) the penalty was excessive.

DISCUSSION

I

Appellant contended that the crucial findings were not supported by substantial evidence, arguing that appellant, through its employees, did not furnish the alcoholic beverages to the minors, and the employees did not possess the requisite knowledge of the service.

David Christian Butterfield, a minor, testified at the administrative hearing that he and his four friends sat at a table after entry into the premises. He went with Jason Manuel Campana, another minor, to the bathroom and tried unsuccessfully to wash the stamp off his hand. Someone at the table ordered drinks, and a waitress brought five beers and placed them on the table. Butterfield drank some of the beer while the waitress was present. Butterfield left to dance, and when he returned, there were five new beers on the table, along with five Tequila shots [R.T. 13, 15-19, 21, 51].

Later, Butterfield went with a female, who was over 21, to the bar where Butterfield stood beside her. The female ordered a round of five Tequilas. The bartender served the beverages on a tray which the bartender handed to the female, who then handed the tray to Butterfield while she paid for the beverages, charging them to Butterfield's credit card [R.T. 22-42, 76].

Jason Manuel Campana, a minor, testified at the hearing that he was with a party of four of his friends, which included Butterfield. While he was seated at the table, an order of beers was brought to the table and a beer was placed in front of him.

A second round of beers was also brought to the table, and he drank a beer. A

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waitress later brought five Tequila shots and Campana drank one of them. Campana testified that he did not try to hide his drinking [R.T. 81, 83-85].

Appellant argues that there were inconsistencies, especially in Campana's testimony, as well as conflicts in the evidence. Where there are conflicts in the evidence, the appeals board is bound to resolve conflicts of evidence in favor of the department's decision, and must accept all reasonable inferences which support the department's findings (Gore v. Harris (1964) 29 Cal.App.2d 821, 40 Cal.Rptr. 666). See Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181, 67 Cal.Rptr. 734, 737; Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439, 102 Cal.Rptr. 857--a case where there was substantial evidence supporting the department's as well as the license-applicant's position; and Kruse v. Bank of America (1988) 202 Cal.App.3d 38, 248 Cal.Rptr. 271.

Conflicts in the evidence usually raise questions of the credibility of witnesses as it does in this matter. The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. See Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315, 314 P.2d 807, 812, and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183, 42 Cal.Rptr. 640, 644. Apparently the administrative law judge (ALJ) who presided during the administrative hearing believed the minors' testimony.

Appellant cites the case of Laube v. Stroh (1992) 2 Cal.App.4th 364, 3

Cal.Rptr.2d 779, for the proposition that there must be actual or constructive knowledge of the illegal act.

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The case of Laube, supra, was actually two cases--Laube and De Lena, both of which involved restaurants/bars--consolidated for decision by the Court of Appeal.

The Laube portion dealt with surreptitious contraband transactions between patrons and an undercover agent--a type of patron activity concerning which the licensee had no indication and therefore no actual or constructive knowledge--and the court ruled the licensee should not have been required to take preventive steps to suppress that type of unknown patron activity.

The De Lena portion of the Laube case concerned employee misconduct, wherein an off-duty employee on four occasions sold contraband on the licensed premises. The court held that the absence of preventative steps was not dispositive, but the licensee's penalty should be based solely on the imputation to the employer of the off-duty employee's illegal acts. It is the De Lena portion of the case which applies in this matter.

The imputation to the licensee/employer of an employee's on-premises knowledge and misconduct is well settled in Alcoholic Beverage Control Act case law. See 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; Mack v. Department of Alcoholic Beverage Control (1960) 178 Cal.App.2d 149, 2 Cal.Rptr. 629, 633; and Endo v. State Board of

Equalization (1956) 143 Cal.App.2d 395, 300 P.2d 366, 370-371.

Appellant also argues that "...there is no law against persons of all ages, and particularly of those over the age of majority [most likely meaning those 18 years to 21 years], 'to mingle and join in the activities of their older friends....'" However, the responsibility is upon the licensee not to sell or furnish 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. Department of Alcoholic Beverage Control (1956) 144 Cal.App.2d 626, 301 P.2d 474. Before a sale or a furnishing 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 alcoholic beverages or to whom the alcoholic beverages are to be provided (Business and Professions Code §25658(a)).[2]

Appellant defended the furnishing of the alcoholic beverages by arguing that "...elaborate measures were undertaken at Kokomo's to insure that underage patrons do not gain access to alcoholic beverages on its premises by first identifying underage individuals prior to entering the premises and stamping their hands with fluorescent markings. Inside, underage individuals were identified with the assistance of a large number of black lights (to highlight the fluorescent marks on the hands), and by a large number of personnel who were regularly trained to monitor and preclude underage

[2]Appellant apparently used the designation of underage persons for those persons 18 to 21 years of age. Appellant used the term "minors" to mean those under the age of 18 years. However, in Alcohol Beverage Control Act matters, the designation "minor" means any person under the age of 21 years. Such designation as is commonly used in Alcoholic Beverage Control Act matters will be used by the appeals board in this matter.

individuals from gaining access to alcoholic beverages...." Apparently the "elaborate" measures failed to work in this matter or were not taken seriously by appellant's employees.

The appeals board is well aware that the adult females and the minors knew that they were trying to "get away" with drinking alcoholic beverages in the premises and most likely took some steps to minimize discovery by appellant's staff. But we consider that this is a foreseeable occurrence considering the policies in effect to thwart that type of activity. But this is one of the risks appellant must accept when it allowed minors and adults to commingle in such a nightclub setting.

The people of the State of California, through the California Constitution, Article XX, Section 22, make specific mention of minor-alcoholic beverage consumption--apparently conduct which the citizens of this state desire to be curtailed or stopped by all reasonable means.

In the present matter, appellant's manifest intent to control such underage drinking was well designed, but lacking in proper execution, considering the entrance program, the large staff of waitresses, bartenders, and security who allowed the minors in the present matter almost unlimited access and consumption of alcoholic beverages.

We determine the crucial findings were supported by substantial evidence, and we conclude that there was a sufficient showing of a furnishing.

II

Appellant contended the penalty was excessive. 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).

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The department counsel made a recommendation at the administrative hearing of a standard penalty of 15 days for the two violations. We view such as a recommendation only and not obligatory on the administrative law judge (ALJ). We also observe that when a party to a matter takes the matter to a hearing, penalties imposed may vary, possibly to a lesser degree than the penalty offered before the hearing, but possibly higher.

The department's instructions, interpretations and procedures manual at page L227.1 sets forth the standard penalty of 15 days for sales to minors. On page L225 it states that within its discretion, the department may determine that a greater or lesser penalty is warranted. "A violation participated in by a group of persons shall be considered as a single offense..." [manual, p. L226].

The department, in aggravating the penalty, had the following factors to consider: (1) appellant created the nightclub setting with inducements sufficient to create the desirability of this local "hot spot;" (2) the highly touted and complex plan of mingling 18-21-year-olds with those over 21 years, with wristbands for over-21-year-olds suggests a very good way of enforcing the law, but apparently it did little to

actually prevent violations of the laws concerning minors; (3) employees did not adequately police the premises with any real intent to control minor drinking; and, (4) the large staff, together with the black lights used to pick up the fluorescent markings on the hands of minors, failed to prevent the apparent free access to and overt drinking of alcoholic beverages by the minors.

While the penalty appears aggravated, the reasons for the aggravation were more than sufficient to conclude that the department's intent was to make a point that prohibiting service to minors of alcoholic beverages was appellant's responsibility, especially where appellant had created the enticing atmosphere where minors, more likely than not, would seek to drink alcoholic beverages while trying to avoid detection.

CONCLUSION

The decision of the department is affirmed.[3]

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

[3]This 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.