

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

AB-8960

File: 48-382898 Reg: 07067541

KENNETH and LORRAINE FOLEY, dba Red Brick Saloon
6 North Main Street, San Andreas, CA 95249,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: January 7, 2010
San Francisco, CA

ISSUED MAY 12, 2010

Kenneth and Lorraine Foley, doing business as Red Brick Saloon (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 10 days for permitting a person under the age of 21 to enter and remain in the licensed premises without lawful business there, a violation of Business and Professions Code² section 25665.

Appearances on appeal include appellants Kenneth and Lorraine Foley, appearing through co-licensee (and attorney) Kenneth Foley, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean R. Lueders.

¹The decision of the Department, dated September 24, 2008, is set forth in the appendix.

²Statutory references are to the Business and Professions Code unless otherwise designated.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public premises license was issued on April 19, 2002. On December 20, 2007, the Department instituted an accusation against appellants charging that they allowed 20-year-old Jessie Johnson to enter and remain in the licensed premises in violation of section 25665.

At the administrative hearing held on August 28, 2008, documentary evidence was received and testimony concerning the violation charged was presented by Jessie Johnson, the "minor"; by Department investigators Monica Molthen and Paul Fuentes; and by appellants' bartender, David Gibson.

On the evening of October 27, 2007, the bartender observed Johnson in the premises and, thinking he looked young, asked for Johnson's identification. When Johnson said he did not have any with him, the bartender told him to leave, and Johnson left the premises.

Later that evening, Department investigators and Calaveras County deputy sheriffs entered appellants' licensed premises in the course of a "high profile"³ compliance check. When investigator Molthen entered the bar, she saw Johnson and, thinking that he looked very young, approached him and asked his age. He replied that he was 20 years old, and officers escorted him outside for questioning. Johnson was very drunk at the time, although he testified that he was drunk when he entered the premises and had not ordered or consumed any alcoholic beverages while there. Johnson had apparently been in the bar for 10-20 minutes, by his own estimate, before being apprehended by Molthen. He told the investigators that the bartender had asked

³This means that the officers were not operating undercover, but made their status obvious by wearing vests with "POLICE" in white lettering on the front and back.

him to leave earlier that evening and testified that he had later sneaked in through the back entrance of the premises. The bartender was not aware that Johnson had reentered the premises until after the investigators had taken Johnson outside.

Subsequent to the hearing, the Department issued its decision which determined that the evidence established a violation of section 25665. Appellants filed an appeal contending the decision is not supported by substantial evidence or by the findings.

DISCUSSION

Section 25665 provides, in pertinent part:

Any licensee under an on-sale license issued for public premises, as defined in Section 23039, who permits a person under the age of 21 years to enter and remain in the licensed premises without lawful business therein is guilty of a misdemeanor.

Appellants contend the evidence does not show that the bartender knew of Johnson's presence and failed to act to remove him. They assert that they were diligent in their efforts to prevent underage persons from entering the bar; the bartender did not know that Johnson was in the premises; they did not "permit" Johnson to enter and remain in the bar under the standard set in *Laube v. Stroh* (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779] (*Laube*); and the administrative law judge (ALJ) used the wrong standard in finding a violation of section 25665. The Department contends there is substantial evidence to support the findings and appellants were far less diligent than required by *Laube*.

The Department's position appears to be that since the bartender knew about Johnson entering the bar before, his failure to prevent Johnson from reentering means that he *permitted* Johnson to enter the second time. Appellants take the position that the bartender's earlier removal of Johnson from the bar shows his diligence and

indicates that he would have removed Johnson again as soon as he became aware of him in the bar after he entered the second time.

Both appellant and the Department ignore the most recent court decision involving section 25665: *CMPB Friends, Inc. v. Alcoholic Beverage Control Appeals Board* (2002) 100 Cal.App.4th 1250 [122 Cal.Rptr.2d 914] (*CMPB Friends*). In *CMPB Friends*, a 20-year-old woman, Celeste Jimenez, entered the premises with a group of friends and sat at a table. The waitress (apparently the only one) asked Jimenez for identification after Jimenez had been there about 10 minutes. The Department relied on *Ballesteros v. Alcoholic Beverage Control Appeals Board* (1965) 234 Cal.App.2d 694 [44 Cal.Rptr. 633] (*Ballesteros*), and held that the licensee violated section 25665 by permitting Jimenez to enter the premises and remain there for 10 minutes, and imposed a 10-day suspension. The Appeals Board affirmed the decision.

The Court of Appeal reversed the Department's decision in *CMPB Friends, supra*. It explained and distinguished *Ballesteros, supra*, saying that, without more, the presence of a minor in a licensed premises for 10 minutes does not automatically violate section 25665:

The statute does not provide that a licensee automatically commits a violation when a minor is on the premises. The violation occurs only when the licensee "permits" a minor not only to "enter" the licensed premises, but also to "remain" on the licensed premises without lawful business therein. (§ 25665.) The issue is what constitutes permitting a minor to remain on the premises.

The term "permits" was interpreted by the court in *Ballesteros v. Alcoholic Bev. etc. Appeals Board* (1965) 234 Cal.App.2d 694, [44 Cal.Rptr. 633] (*Ballesteros*), to include apathetically allowing one who is later discovered to be a minor to remain on a premises without checking proof of age. In that case, an underage woman entered a bar with her husband and a group of friends, all over 21. The bar was dark and busy. The minor and her friends sat at a table at the opposite end of the room from the bar where the lone bartender was working. The minor's husband and two of her friends went to the bar to order drinks, including a soft drink

for the minor. Because the bartender was familiar with the minor's husband and some members of the group the minor accompanied, having checked their identifications on prior occasions and determined they were of age, he served the requested drinks. The bartender did not approach the party's table or otherwise notice the minor's presence. "A few minutes" later, a police officer entered the bar, approached the minor's table, and determined that she was not yet 21. According to the minor, she had been in the bar for 10 minutes before the officer arrived. (*Id.* at pp. 696-699.) Based on those facts, the *Ballesteros* court found the bartender had been "inactive or passive" with respect to his duty to ascertain the minor's age, and so had, in effect, permitted the minor to remain on the premises for "at least ten minutes." (*Ballesteros*, 234 Cal. App. 3d at pp. 700-701.)

(*CMPB Friends*, 100 Cal.App.4th at p. 1255.)

The court in *CMPB Friends* went on to explain that

the import of the *Ballesteros* decision is that, in light of the particular facts of each case, a licensee may be found to have behaved so passively with regard to its affirmative duty to exclude minors from its premises that a violation is established.

In *Ballesteros*, *supra*, 234 Cal.App.2d 694, the bartender's failure to check the minor's identification within the 10 minutes the minor had been on the premises and the indication that he never would check the identification supported the determination of a violation. Here, in contrast, the evidence shows that the waitress did not allow Ms. Jimenez's presence in the Royal Room to go unnoticed and unchallenged. Rather, upon detecting Ms. Jimenez's presence, the waitress attempted to ensure that Ms. Jimenez was at least 21 years old.

(*CMPB Friends*, 100 Cal.App.4th at p. 1256.)

The court also discussed factors that should be considered in analyzing the facts of a given case:

We do not suggest that licensees need not remain vigilant as to the ages of their patrons. As the court in *Ballesteros*, *supra*, 234 Cal.App.2d at page 700, correctly recognized, licensees bear an affirmative duty to ensure that minors are not permitted to enter and remain in their premises in violation of section 25665. (See also *Givens v. Dept. Alcoholic Bev. Control* (1959) 176 Cal.App.2d 529, 534, [1 Cal.Rptr. 446] ["[A]n on-sale licensee has an affirmative duty to maintain properly operated premises"]; *5501 Hollywood, Inc. v. Dept. Alc. Control* (1957) 155 Cal.App.2d 748, 753, [318 P.2d 820].) We simply hold that there is no set period of time in which a violation occurs. In this case, when, apparently, one waitress was

serving 40 to 60 patrons and took 10 minutes to observe and then approach a minor who entered the bar, those 10 minutes do not necessarily constitute an unreasonable amount of time within which to demand proof of age. In other circumstances, permitting the minor to remain in a public premises for 10 or fewer minutes may, based on all the evidence, be enough to establish a violation. Such a determination is a question of fact to be decided in each case.

The sufficiency of the number of employees necessary to check the identification of minors on or entering the premises may also be a factor in determining whether a licensee has permitted a minor to remain in the premises, especially if the premises frequently attracts minors or is crowded. A licensee cannot necessarily predict the number of patrons so as always to have staff sufficient to make an immediate check of identification. For example, in this case, the record shows that on the night in question, a large group came into the Royal Room from a theatrical school to celebrate a dress rehearsal. If that was such an unexpected and unusual influx of patrons as to make understandable a delay in observing and checking the identification of minors, that circumstance should be considered in determining whether a violation occurred. On the other hand, if it were demonstrated that petitioner generally lacked the staff necessary to check identification such that it was not unusual for minors to enter and remain on the premises, then the Department might be justified in finding that the licensee, in effect, permitted minors to remain on the premises.

(*CMPB Friends*, 100 Cal.App.4th at pp. 1256-1257.)

CMPB Friends makes clear that a violation of section 25665 may not be based solely on a minor's entry into a licensed public premises or on a minor remaining in the premises for a predetermined period of time, such as 10 minutes. Instead, there must be consideration of all the facts in each case, and findings must be made as to whether the licensee and/or his or her employees "were reasonably diligent or were so tardy under the circumstances as to demonstrate that [the minor had been] permitted . . . to remain on the premises." (*CMPB Friends*, 100 Cal.App.4th at p. 1256.)

In the present case, four of the five Findings of Facts (FF II-V) made up the substantive basis for the Department's decision:

II. On October 27, 2007, Jessie Johnson, who was then twenty years old, entered Respondents' bar. He remained there until asked by

Respondents' bartender, David Gibson, for his identification. When Johnson did not produce any identification, the bartender asked him to leave. Johnson then left.

III. Johnson later reentered Respondents' bar. According to the Department's investigation report (State's Exhibit 3), Department investigators and Calaveras County deputy sheriffs entered Respondents' bar at approximately 11:20 p.m., and Respondents' bartender told them that he had asked Johnson to leave at approximately 11 p.m. On the other hand, Johnson testified that three hours passed before he returned to the bar. Whether the duration between Johnson's first entry into Respondents' bar and the second entry was twenty minutes or three hours is not relevant.

IV. On his second entry into Respondents' bar, Johnson remained in the bar for ten to twenty minutes, at which time he was contacted by Department investigators and escorted outside.

V. Respondents' bartender did not see Johnson reenter the bar. He also did not know that Johnson was in the bar when Department investigators escorted him (Johnson) out.

The decision's Legal Basis for Decision consisted of citation of the relevant statutes and the following quotation from *Laube, supra*, 2 Cal.App.4th at p. 379:

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. Once a licensee knows of a particular violation of the law, that duty becomes specific and focuses on the elimination of the violation. Failure to prevent the problem from recurring, once the licensee knows of it, is to "permit" by a failure to take preventive action.

Paragraphs I and III of the Determination of Issues⁴ were as follows:

I. A "reasonably possible unlawful activity" at a bar is an underage customer's entry into, and remaining in, the bar. Respondents' bartender acknowledged knowing about this reasonably possible unlawful activity. In fact, he had asked Johnson to leave the bar because Johnson could not provide proof of majority. Nevertheless, Johnson was able to return to, and remain in, the bar undetected until contacted by law enforcement officials. These facts support a conclusion that Respondents' bartender

⁴Paragraph II stated the Department's recommendation as to penalty.

was not diligent in anticipation of the reasonably possible unlawful activity. In accordance with the reasoning provided in the Laube decision cited above, Respondents' bartender permitted Johnson to enter and remain in Respondents' bar without lawful business. This permitting is imputed to Respondents and constitutes cause for suspension of Respondents' license, in accordance with Business and Professions Code Sections 24200(b) / 25665.

III. Respondents repeatedly stressed that when their bartender saw Johnson in the bar, he asked to see Johnson's identification, and asked Johnson to leave when he did not produce one. The bartender's action is not helpful to Respondents' case. By the time the bartender saw Johnson in the bar, the violation of Business and Professions Code Section 25665 had already been committed.

In the present case, the decision does not find that the bartender was "inactive or passive" (*CMPB Friends, supra*, 100 Cal.App.4th at p. 1255, quoting *Ballesteros, supra*, 234 Cal.App.3d at p. 701) about discovering Johnson's presence in the bar. It merely found the bartender did not know that Johnson had reentered the premises. The ALJ determined that the bartender "was not diligent" in preventing Johnson's presence in the bar, based solely on the fact that Johnson was able to reenter and remain in the premises undetected until a Department investigator discovered him. (Det. of Issues I.)

It is clear that the ALJ and the Department concluded that section 25665 had been violated on the basis that Johnson reentered and remained in the premises for some amount of time without the bartender checking his identification. Reading Determination of Issues II, it appears the ALJ also believed that section 25665 was violated the first time Johnson entered as well as the second time, even though the bartender discovered Johnson and made him leave, and the Department neither charged nor suggested that a violation occurred the first time Johnson entered.

The decision does not consider any other circumstances of the incident such as the number of patrons and employees, Johnson's actions while in the premises, or

evidence of what the bartender was doing at the time. The ALJ used what is essentially a strict liability standard - Johnson was in the premises without lawful business, therefore the bartender and, by imputation, appellants, permitted him to do so and violated section 25665.

The strict liability standard used by the ALJ is made even more clear by the reporter's transcript of the hearing. The ALJ told the parties several times that he didn't need to hear more facts [RT 56, 58-59, 66] and, in response to the Department's attempt to address the issue of whether the bartender should have observed Johnson when he reentered the bar, the ALJ said, "Does it matter? I think you proved that the minor was in there." [RT 59.] As *CMPB Friends* makes clear, this is not the appropriate standard to be used with regard to section 25665.

As it has done here, the Department failed to consider, or even acknowledge, the circumstances in *CMPB Friends* and the court in that case said:

A question remains as to whether the waitress's efforts were reasonably diligent or were so tardy under the circumstances as to demonstrate that she, and therefore the licensee, permitted Ms. Jimenez to remain on the premises. There have been no findings on that issue. The matter must be remanded to the Department for further findings on the conduct of petitioner under all of the circumstances in this case. The sole finding that Ms. Jimenez was present in the Royal Room for 10 minutes is not enough to conclude that petitioner violated section 25665.

(*CMPB Friends* at p. 1256.)

We likewise will remand the matter to the Department so that it may hear evidence on the appropriate factual issues and make its determination using the appropriate standard as explained in *CMPB Friends*.

ORDER

The decision of the Department is reversed and the matter is remanded to the Department for further proceedings.⁵

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁵This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.