

ISSUED AUGUST 7, 1996

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

SANTA MONICA BREWING COMPANY, INC.)	AB-6588
1246 Santa Monica Mall)	
Santa Monica, CA 90401,)	File: 41-298761
Appellant/Licensee,)	Reg: 95032630
)	
v.)	Administrative Law Judge
)	at the Dept. Hearing:
THE DEPARTMENT OF ALCOHOLIC)	Marguerite C. Geftakys
BEVERAGE CONTROL,)	
Respondent.)	Date and Place of the
)	Appeals Board Hearing:
)	July 1, 1996
)	Irvine, CA

Santa Monica Brewing Company, Inc. (appellant), appealed from a decision of the Department of Alcoholic Beverage Control¹ which suspended appellant's on-sale beer and wine public eating place license for ten days, for appellant's employee selling an alcoholic beverage to a minor, a person under the age of 21 years, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, Article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

¹The decision of the department dated October 19, 1995, is set forth in the appendix.

Appearances on appeal included appellant Santa Monica Brewing Company, Inc., appearing through its president, Dr. Lewis Harsanyi; and the Department of Alcoholic Beverage Control, appearing through its counsel, John P. McCarthy.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public eating place license was issued on October 3, 1994. Thereafter, the department instituted an accusation against appellant on April 11, 1995, concerning the sale of an alcoholic beverage to a minor.

An administrative hearing was held on September 15, 1995, at which time oral and documentary evidence was received. At that hearing, Santa Monica Brewing Company, the licensee, failed to appear either by corporate personnel or by other representation, and the matter proceeded as a default under Government Code §111520. The department determined that appellant's employee sold an alcoholic beverage (beer) to a police decoy who was 19 years old at the time of the sale.

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

In its appeal, appellant raised the contention that the sale and service to the minor was a mistake by the waiter.

DISCUSSION

Appellant contended that the sale of an alcoholic beverage to the minor was a negligent act and a simple mistake by the waiter. Appellant argued therefor, that the

matter should be dismissed.

The appeals board does not have the authority to dismiss an action taken by the department, as the appeals board's scope of 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 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. The appeals board is also authorized to determine whether the department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.²

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 record shows that on February 2, 1995, Michele Gilchrist entered the premises. Gilchrist was within three months of being 20 years of age. She sat at a table and was approached by a waiter, who asked if she wanted a beverage to drink. Responding to the minor's statement that she did not know what she wanted, the

²The 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.

waiter went to the bar and obtained two shot glasses containing two kinds of beer. The waiter returned to the minor and told her to try each one and determine which she wanted. Gilchrist made a selection of the kind of beer she wanted and was served a glass of the selected beer. The minor testified that the waiter then told the minor that she could keep the two shot glasses and that he was going to get the minor "smashed." [R.T. 12-16].

The responsibility is upon the 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. Department of Alcoholic Beverage Control (1956) 144 Cal.App.2d 626 [301 P.2d 474].) 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, subdivision (a)). Additionally, a licensee is vicariously responsible for the unlawful on-premises acts of the licensee's employees. Such vicarious responsibility is well-settled by case law. (Mack v. Department of Alcoholic Beverage Control (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629, 633]; Morell v. Department of Alcoholic Beverage Control (1962) 204 Cal.App.2d 504 [22 Cal.Rptr. 405, 411]; and Harris v. Alcoholic Beverage Control Appeals Board (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315, 320].)

From appellant's brief, we conclude that appellant, in addition to the contention that it should not be held responsible for the unlawful act of its employee, suggested that the penalty was unfair.

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].)

The department's Instructions, Interpretations and Procedures Manual at page L227.1 sets forth the recommended penalty of 15 days for a sale to a minor. The decision of the department was a suspension of ten days. Considering such factors, any dilemma as to the appropriateness of the penalty must be left to the discretion of the department. The department having exercised its discretion reasonably, the appeals board will not disturb the penalty.

CONCLUSION

The decision of the department is affirmed.³

RAY T. BLAIR, JR., CHAIRMAN
JOHN B. TSU, MEMBER
BEN DAVIDIAN, MEMBER

³This 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.

ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD