ISSUED MAY 25, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

AMF BOWLING CENTER, INC. dba AMF Bowlerland Lanes 7501 Van Nuys Blvd. Van Nuys, CA 91405, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7232 File: 41-325941 Reg: 98043519 Administrative Law Judge at the Dept. Hearing: John P. McCarthy Date and Place of the Appeals Board Hearing: March 2, 1999 Los Angeles, CA

AMF Bowling Center, Inc., doing business as AMF Bowlerland Lanes (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its on-sale general public eating place license for 15 days, for permitting the consumption of beer, an alcoholic beverage, by Yasmine Guttierrez, 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, and Business and Professions Code §24200, subdivision (a), arising from a violation of Business and Professions Codes §§24200, subdivision (b), and 25658, subdivision (b).

[1]The decision of the Department, dated September 24, 1998, is set forth in the appendix.

Appearances on appeal include appellant AMF Bowling Center, Inc., appearing through its counsel, J. Daniel Davis, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathan E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on February 10, 1997. Thereafter, the Department instituted an accusation against appellant charging that a person under the age of 21 years consumed beer, an alcoholic beverage, while within appellant's premises.

An administrative hearing was held on July 30, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the violation.

Guadalupe Ruiz, a police officer with the Los Angeles Police Department, testified that, with other members of his department, he was in the premises, a bowling establishment at a time when an estimated 50-65 patrons were bowling. The minor, her husband, and friends were seated and were engaged in conversations. The husband took a drink from a plastic cup, and when he left the table, the minor took a sip from the cup, which contained beer [RT 7, 10-11]. The officer also testified that he observed, at the time of the drinking, that the manager was walking past the minor's table and that the manager was looking in the direction of the minor at the time of consumption [RT 12, 18].

David L. Lewis, the manager of the premises, testified that he periodically walked through the premises, had five employees on duty, and the waitresses were trained to look for potential law violations [RT 22-26].

Subsequent to the hearing, the Department issued its decision which determined that a violation had occurred.

Appellant thereafter filed a timely notice of appeal, and raises the following issues: (1) the accusation does not state acts or omissions upon which the Department may discipline; (2) the Department's decision does not comply with the law; (3) there was no permission given or shown; (4) there was no showing that public welfare or morals would be impaired; and (5) the Department exceeded its jurisdiction by suspending appellant's license. Issues 1, 2 and 3 will be considered together.

DISCUSSION

I

Appellant contends the accusation does not state acts or omissions upon which the Department may discipline; the Department's decision does not comply with the law; and there was no permission given or shown. Appellant argues that the Department " ... failed to allege any acts or omissions that even implied AMF knowingly permitted the illegal consumption on the premises."

Government Code §11503, cited by appellant, states in pertinent part:

> " ... The accusation shall be a written statement of charges which shall set forth in ordinary and concise language the acts or omissions with which the [appellant] is charged, to the end that the [appellant] will be able to prepare his defense ...."

The accusation states:

> "On or before February 13, 1998, [appellant], by its agent or servant, caused or permitted [the minor] to consume an alcoholic beverage ...."

The accusation seems sufficiently explicit to allow appellant to prepare a defense. At no time has appellant contended that it could not properly defend against the charge.

Appellant next contends the Department failed to allege a subdivision of the statute which prohibits minor consumption, which subdivision specifically states the licensee must "knowingly" permit the prohibited act.[2] While the Administrative Law Judge cited this subdivision in his decision, appellant contends the citation is improper, since appellant was not charged under this subdivision. Appellant is correct as to the erroneous citation by the Administrative Law Judge.

Essentially, appellant argues that the Department failed to cite a statute with its more proper subdivision, which states there is a violation only if a licensee knowingly permits consumption. Appellant also argues that subdivision (d) is a specific statute and controls, over a more general statute, subdivision (b), that which was charged. We agree that actual or constructive knowledge on the part of appellant's employees must be proven.

The accusation charged a violation of §25658, subdivision (b):

> "Any person under the age of 21 years who purchases any alcoholic beverage or any person under the age of 21 years who consumes any alcoholic beverage in any on-sale premises, is guilty of a misdemeanor."

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[2]Business and Professions Code §25658, subdivision (d) states: "Any on-sale licensee who knowingly permits a person under the age of 21 years to consume any alcoholic beverage in the on-sale premises, whether or not the licensee has knowledge that the person is under the age of 21 years, is guilty of a misdemeanor." "The term 'knowingly' means 'with knowledge,' and when used in a prohibitory statute is usually held to refer to a knowledge of the essential facts; and from such knowledge of the facts the law presumes a knowledge of the legal consequences arising from the performance of the prohibited act." (People v. Plumerfelt (1939) 35 Cal.App.2d 495 [96 P.2d 190, 192].)

The Department alleged in the accusation that appellant's manager permitted the consumption. The statute cited by the Department only states that the minor committed a penal act, by the consumption of the beer. Therefore, for the decision to be proper, the Department must connect the illegal act of the minor with some type of knowledge or assent, or failure to act upon known presumptive knowledge, on the part of the manager or employees, of that consumption, thus showing knowledge, either actual or constructive, to avoid the demands in Laube v. Stroh (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779]: there be no strict liability.

The Determination of Issues of the decision states that "... It [the consumption] happened inside [appellant's] premises. Therefore, the unlawful consumption was permitted by [appellant] through its employees or agents ...." While this determination may be correct as far as it goes (the mere fact of happening on the premises), the issue is still whether the Department can connect some actual or constructive knowledge by the manager or employees, to constitute a "permitting" and avoid the imposition of strict liability.

In the present case, there is no evidence that the manager, when he passed by the minor, saw the minor drinking, or evidence that any employee saw the consumption. The definition of the term "knowingly" as set forth in footnote 2, has remained unchanged since its enactment in 1892. Thus, if the accusation had been pled under §25658, subdivision (d), the consumption charges would fail, since there is no evidence that any employee of appellant observed the consumption by the minor.

The Department, in other cases, has contended that it need not base its accusation on §25658, subdivision (d). Instead, it contends that the minor's violation of subdivision (b) was permitted by the licensee, and, under Business and Professions

Code §24200, subdivision (b), "the causing or permitting of a violation" is a ground for suspension or revocation.

Appellant essentially contends, in effect, that this would be liability without fault. It is certainly true that Laube v. Stroh, supra, rejected the concept of strict liability - liability without fault - as well as the notion that a licensee can have permitted something of which he had no knowledge.[3] The proof of this is found in such statements as these:

> "The Attorney General contends that knowledge of 'permitted' behavior is not required, and that neither petitioner took sufficient preventive measures because drug transaction did occur. We disagree with both contentions. Having examined in detail the historical antecedents of McFaddin, we respectfully conclude that the Board's interpretation of McFaddin is incorrect, and leads to unwarranted liability without fault ...." (2 Cal.App.4th at page 371.)
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> 'The concept that one may permit something of which he or she is unaware does not withstand analysis." (2 Cal.App.4th at page 373.]
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> "We respectfully differ with the Board's perception of McFaddin and its antecedents, and hold that a licensee must have knowledge, either actual or constructive, before he or she can be found to have 'permitted' unacceptable conduct on a licensed premises. It defies logic to charge someone with permitting conduct of which they are not aware. It also leads to impermissible strict liability of liquor licensees when they enjoy a constitutional standard of good cause before their license - and quite likely their livelihood - may be infringed by the state." (2 Cal.App.4th at page 377.)

But, in holding that there must be "actual or constructive" knowledge before there can be a finding that a licensee permitted unacceptable conduct, the court appears to

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[3]Laube v. Stroh is most frequently cited for the following proposition: "The Marcucci case perhaps states it best. 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 failure to take preventive action."

have left room for cases where, although proof of actual knowledge may not be present, circumstances might warrant inferring the existence of such.[4]

Appellant is a relatively large bowling facility, where, because of its license (an on-sale restaurant type), minors and adults are allowed to freely mingle within the premises, sit together at tables, and use the bowling lanes together. At the same time, adults are allowed to order and consume alcoholic beverages within the premises, while sitting at tables in close proximity to minors, or in the actual areas of bowling, all alongside minors.

The findings state that "... According to Lewis [the manager], it is the responsibility of everyone employed by [appellant] in the public areas to monitor the patrons for underage consumption of alcoholic beverages." The duty of the employees is to control minor consumption, by assessing all patrons in the public areas of the premises, and to determine whether they are (by appearance) minors, and then monitor the minors' conduct as to alcoholic beverage consumption.

Section 25658, subdivision (d) is more like an arrow pointed at a specific target, while the more general combination of §24200, subdivision (b) and §25658, subdivision (b), can be directed at cases such as this, where public policy demands a higher level of vigilance when an on-sale general licensee caters to a clientele heavily made up of a large mix of minors and adult patrons.

While this is a most difficult task, that is not the issue. It is the duty of appellant to do so. In the matter before us, it is appellant which has created the scenario where

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[4] "Constructive ... Inferred - often used in law of an act or condition assumed from other acts or conditions which are considered by inference or by public policy as amounting to or involving the act or condition assumed." (Webster's Third New International Dictionary (1988) p.489.)

only by extreme due diligence, will the act here committed, be prohibited from occurring. While only an argued "sip," if allowed to avoid this difficult responsibility, such institutions like appellant's could create more of a problem than now exists.[5] Appellant had procedures in place with instructions to monitor minors, yet in this instance, such laudatory and touted controls failed.

II

Appellant contends there was no showing that public welfare or morals would be impaired, as the act was only one sip of beer.

The court in Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Ca.3d 85, 99 [84 Cal.Rptr. 113], defined the concept of public welfare and morals in a manner that adapts the definition to almost all factual matters and circumstances:

> "It seems apparent that the 'public welfare' is not a single, platonic archetypal idea, as it were, but a construct of political philosophy embracing a wide range of goals including the enhancement of majority interest in safety, health, education, the economy, and the political process, to name a few. In order intelligently to conclude that a course of conduct is 'contrary to public welfare' its effects must be canvassed, considered and evaluated as being harmful or undesirable."

The Boreta court in footnote 22, states:

> "We do not mean to intimate that the Department [of Alcoholic Beverage Control] is confined to consider violations of criminal statutes or department directives as grounds for suspension or revocation under section 24200, subdivision (a). It is not disputed that while the Department may properly look to and consider a licensee's violation of the Alcoholic Beverage Control Act, the Penal Code, other state and federal statutes, or Department rules, as constituting activities contrary to public welfare or morals, it may also act on situations contrary to public welfare or morals in the sale or serving of alcoholic beverages regardless of legislative expressions of policy on the subject or prior departmental announcements."

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[5]We found the same type of laxity in the case of Bae & Kim (1994) AB-6370.

Appellant's contention would demand of the Appeals Board a determination as to the degree of the offense. One "sip" is a violation, and more sips are not needed to create the offense.

III

Appellant contends that the Department exceeded its jurisdiction in suspending appellant's license. 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].)

Appellant argues that "... Suspension of AMF's license based on the facts of this case would exceed the Department's jurisdiction. As set forth in Section VI, supra, there is no evidence, let alone sufficient evidence, that AMF's failure to stop a minor's single unknown [unseen ?] sip of a husband's beer renders the continuance of AMF's licenses (sic) 'contrary to public welfare or morals.' To suspend AMF's license on such facts would be an abuse of discretion ...."

Appellant characterized the consumption as a "single sip of a husband's beer ..." Consumption is consumption, an illegal act. The fact that the beer was the minor's husband's is irrelevant. If such characterization were upheld, then appellant in its large bowling establishment could become more lax than presently shown, and not attempt the vigilance necessary to prohibit drinking by minors.

Within the environment appellant has allowed, if not created, appellant has set up a mix of adults and minors begging for violations such as presently before us. By bringing adults and minors into such close proximity and intimate contact, where alcoholic beverages are transported to different locations within reach of minors, appellant has essentially created the circumstances, to which it now seeks an escape.

We have sympathy with the plight of appellant which apparently has not caught the eye of legislative enactment, or the concern of the Department. Notwithstanding such plight, great diligence must be used so that the consumption by minors is not permitted, as the citizens and Constitution demand protection of minors from such products. While this case has been shown to be a technical violation of the law, it is not de minimis.

ORDER

The decision of the Department is affirmed.[6]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[6]This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §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 §23090 et seq.