ISSUED OCTOBER 8, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

KDM ENTERTAINMENT, INC. dba Kokomo's 17927 MacArthur Boulevard Irvine, California 92614, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)))))))))))))	AB-6976 File: 47-185953 Reg: 97039817 Administrative Law Judge at the Dept. Hearing: John P. McCarthy Date and Place of the Appeals Board Hearing: August 12, 1998 Los Angeles, CA

KDM Entertainment, Inc., doing business as Kokomo's (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 45 days for its bartender having sold an alcoholic beverage (two bottles of Bud Light beer) to Bernardo Castro, a person then approximately 18 years of age, 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).

[1]The decision of the Department, dated November 6, 1997, is set forth in the appendix.

Appearances on appeal include appellant KDM Entertainment, Inc., appearing through its counsel, Rick Blake, and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on August 21, 1986. On May 7, 1997, the Department filed an accusation against appellant charging a violation of Business and Professions Code §25658, subdivision (a), by reason of the sale of beer to Bernardo Castro, who was then approximately 18 years of age.

An administrative hearing was held on August 13, 1997. At that hearing, Department investigators Eric Froeschner and William Johnson testified that they observed appellant's bartender, Matthew Stevens, sell two bottles of Bud Light beer to Castro. Neither Froeschner nor Johnson were able to see whether Castro was wearing a wrist band, a device used by appellant, in conjunction with a hand stamp, to denote drinkers of legal age, because he was wearing a long-sleeved shirt. Neither was able to say whether or not the bartender could have seen the wristband from his vantage point behind the bar. The wrist band was furnished at the entrance to patrons who produced identification showing them to be 21 or older. These patrons also received a black "PASS" stamped on their right hand. Younger patrons received an "X" stamp on the back of each hand, with a fluorescent orange ink, supposedly difficult to remove [RT 55-56].

Bernardo Castro testified that when he entered Kokomo's, he displayed

identification showing his correct age. He and his cousin were then patted down and searched, and he received a stamp on his right hand. He denied having any false identification with him. Shortly after entering the premises, Castro found a wrist band on the floor, and put it on. He was wearing it when he purchased the beer. He was not asked for any identification by the bartender [RT 40], and did not know whether the bartender had been able to see the wrist band he was wearing [RT 46].

Christian Trull, appellant's manager, also testified, describing the security procedures Kokomo's uses to check the ages of its patrons, including an initial check of identification and the use of the stamps and wrist bands. He explained that the wrist bands or fluorescent stamps are relied upon in lieu of identification once a patron is inside, unless there are questions, because the individual checking of identification would make it difficult to serve the large number of patrons. The wrist band is constructed of such material that its removal from the wrist requires it to be torn and its adhesive quality lost, and, supposedly, it cannot be reused. However, it would appear from the facts of this case that this is not always true. Trull stated that patrons commonly remove the wrist bands as they are leaving the premises, and often simply drop them on the floor [RT 62]. Stevens, the bartender, did not testify.

At the conclusion of the hearing, Department counsel recommended that, in light of Kokomo's past record and the clear-cut nature of the violation, its license should be revoked. Kokomo's counsel argued that the physical condition of the

wrist band, and the apparent absence of an orange stamp on Castro's hands, suggested that he had gained entry to the premises with a false identification, passing for 21 or older.

Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation[2] and imposed the 45-day penalty which is the subject of the present appeal.

Appellant's timely appeal presents the following issues: (1) appellant's system for checking of identification and prevention of sales to minors, although not foolproof, entitles it to mitigation, because it was defeated only by a "devious deceptiveness"; and (2) the penalty is excessive.

DISCUSSION

I

Appellant contends that its utilization of a nearly foolproof system for checking identification and preventing sales to minors, defeated only by what it characterizes as "devious deceptiveness" on the part of Castro, entitles it to mitigation.

It could be said that appellant is playing with fire by operating as a club under an eating place license, allowing minors to mingle with drinkers of legal age, and expecting minors not to attempt to beat the system.

Appellant's suggestion that Castro was deceptively devious is nothing but an

[2] The accusation pleaded two counts of sales to minors, but count 2 was dismissed because the Department could not produce the second minor, Castro's cousin, Rodolfo Castro.

exaggeration. For Castro to have found a discarded wrist band is entirely plausible (appellant's manager, Christian Trull, acknowledged that customers routinely begin discarding the wrist bands from midnight on, leaving them for employees to pick up).[3] Castro's purchase was a short time after 12:35 a.m. [RT 62], and, we can surmise, the temptation to use the wrist band was irresistible.

It seems obvious that appellant has chosen, out of profit motive, to cater to a patron mixture of adults and minors, and has, for practical reasons (the impracticability of asking for identification during busy periods [RT 59]), adopted a system that assumes that the checking of identification at the time the patron enters eliminates the need for individual checking of identification at the time of service. Although the bartenders are expected to provide a backup system, there was none in this case.

It is simply a business judgment on appellant's part to accept the risk that its system, known to have flaws, can fail. Use of such a system is hardly a basis for mitigation.

II

Appellant also challenges the 45-day suspension as excessive when tested by any sense of reasonableness.

Appellant suggests that the Department "for the most part dismissed" its

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[3] Trull also admitted that he had never paid attention to whether the discarded wrist bands could be re-adhered [RT 62]. Apparently, as the evidence in this case indicates, the bands can be reconnected, at least to an extent that they could be of assistance to a minor attempting to purchase an alcoholic beverage without having to show identification and proof of legal drinking age.

prior disciplinary history in considering the appropriate penalty (App.Br., p.3), and argues that, even if prior disciplines are considered, the only previous sale to a minor was two and on-half years earlier.

Appellant points out that the current sale-to-minor violation would not be a second "strike" under Business and Professions Code §25658.1, since that statute did not take effect until January 1, 1995, after the 1994 violation. Then, proceeding on the implicit premise that what is involved is a first strike, appellant suggests that §25658.1 implies that the appropriate penalty for a first violation is 15 days. Appellant reasons that, since a petition in offer of compromise is available only where the penalty is 15 days or less, and since the statute only makes second- and third-offenders ineligible for the petition option, it must mean that a first strike requires a penalty which preserves its eligibility for that option.

This Board does not read §25658.1 as suggesting anything with regard to what is an appropriate suspension for the first, or any other, sale-to-minor violation. If anything, the Legislature is saying that a repeat offender (within the requisite time frame) is ineligible for the petition option regardless of the length of the suspension imposed.

Contrary to appellant's suggestion that the Department dismissed appellant's previous disciplinary record, it would seem obvious that the 45-day suspension took that record into account. Indeed, the Department recommended license revocation, reciting all matters since 1992, whether pending or final.

The ALJ stated that the matters which were not yet final could not be

considered, so we must assume he did not consider them. However, based upon appellant's track record as reflected by the matters which have become final, it is no stranger to discipline, yet continues to run afoul of the law.

Unless the Board is prepared to say that only identical priors may be considered when assessing a penalty, and we are not, the 45-day suspension does not appear to be unreasonable.

In any event, the 45-day suspension is a one-step increase over the earlier sale-to-minor penalty of 30 days, which was based upon two concurrent infractions.

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

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[4]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 decision as provided by §23090.7 of said code.

Any party, before this final decision becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.