

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

AB-9883

File: 48-577488; Reg: 19088575

MATTHEW COIT ENTERTAINMENT, LLC,
dba McGovern's Irish Pub
214 East 4th Avenue
San Mateo, CA 94401,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: David W. Sakamoto

Appeals Board Hearing: October 1, 2020
Telephonic

ISSUED OCTOBER 5, 2020

Appearances: *Appellant:* Charles J. Katz, as counsel for Matthew Coit Entertainment, LLC,

Respondent: Matthew Gaughan, as counsel for the Department of Alcoholic Beverage Control.

OPINION

Matthew Coit Entertainment, LLC, doing business as McGovern's Irish Pub (appellant), appeals from a decision of the Department of Alcoholic Beverage Control (Department)¹ suspending its license for 10 days (with 5 days conditionally stayed for a period of one year, provided no further cause for discipline arises during that time), because it permitted minors to enter and remain in the premises, in violation of Business and Professions Code section 25665.

¹ The decision of the Department under Government Code section 11517(c), dated April 16, 2020, is set forth in the appendix as is the Administrative Law Judge's (ALJ's) proposed decision, dated September 10, 2019, which was considered and rejected by the Department.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general license was issued on April 11, 2017. There is no record of prior departmental discipline against the license.

On February 28, 2019, the Department instituted a three-count accusation against appellant charging that, on January 25, 2019, appellant's agents or employees permitted three individuals under the age of 21 to enter and remain in the licensed premises without lawful business therein. (Exh. 1.)

At the administrative hearing held on June 5, 2019, documentary evidence was received and testimony concerning the violation charged was presented by Department Agent Daniel Louie. Matthew E. Coit, the owner of the licensed premises, testified on behalf of appellant.²

Testimony established that on January 25, 2019, Department Agents Louie, Ott, and Cook entered the licensed premises in an undercover capacity. Agent Louie testified that they entered the premises at 9:53 p.m. while Mr. Coit testified that according to the agents' report they entered at 9:54 p.m.³ The agents looked around the premises for possible alcohol-related violations and noticed youthful individuals at two adjacent booths. The agents observed them briefly, then identified themselves and asked the individuals for identification (ID).

The individuals in one booth had their IDs checked and all were at least 21 years old. At the other booth, Sophia Lynn Delli-Gatti and Samantha Jo Tringali handed their

² Appellant was represented by different legal counsel (Donald A. Ramirez) at the administrative hearing.

³ The agents' report was not entered into evidence.

IDs to Agent Louie. Ms. Tringali told him that she was 21. Both IDs appeared to be real and were returned. Jacqueline Delli-Gatti's ID was checked and it was determined that she was 21. Jacqueline Fletcher handed over her ID, but Agent Louie did not think the quality of her driver's license was the same as the other three and suspected that it was fake. Agent Louie told Ms. Fletcher that lying to a police officer was a more serious crime than being a minor inside a bar. He asked her again if her ID was real and she replied that it was not and admitted that she was 19.

Agent Louie then asked his partners to recheck the IDs of the women he had already checked. Sophia Delli-Gatti's ID was found to be fake. Citations were issued to Sophia Delli-Gatti and Jacqueline Fletcher for being in possession of fake IDs and for being in a premises where individuals under 21 are forbidden. Testimony established that these citations were issued to show violations occurring at 9:57 p.m. — three to four minutes after the agents entered the licensed premises. (RT 68.) Several days later, Samantha Jo Tringali's ID was also determined to be fake.

An employee, Ralph Nobleza, contacted the agents and told them he was the doorman. He explained that he had not yet checked the IDs of the four young women because he had just come on duty for his 10:00 p.m. shift and had just started a sweep of the premises to check IDs after putting away his sweater. Agent Louie did not ask the doorman if he knew when the young women had arrived in the premises.

Two bartenders were on duty on January 25, 2020, servicing as many as 40 customers (RT 36) at the time the agents were doing their inspection. Testimony established that table service is not provided in the premises and that customers must come to the bar to obtain beverages. IDs are checked at that time and customers receive a hand stamp showing they are over 21. On busy nights a doorman comes on

duty at 10:00 p.m to check IDs at the door. He makes a sweep of the premises when he first arrives, checking IDs of everyone in the premises to make sure they are all over the age of 21 before taking up his post at the door. A second doorman is added if the premises is busier.

The policy of the premises is that everyone who appears to be under the age of 40 is asked for ID, and IDs for group orders (such as a pitcher of beer) are checked for all members of the group. (RT 110-111.) In addition, IDs are checked periodically for individuals who are in the premises to play video games to ensure that they are over 21. (*Ibid.*)

The two bartenders on duty were not interviewed on the night in question. One, Javier Magallon, was interviewed by phone on February 5, 2020 and the other, Jeanett Divinagracia, was interviewed by phone on February 6, 2020 — eleven and twelve days after the incident, respectively. No explanation was offered for failing to interview the bartenders at the time of the alleged violations, but at oral argument there was discussion that this may have been because the premises was busy and the agents didn't want to disrupt the bartenders while they were working. No explanation was given for why the bartenders were not called as witnesses at the administrative hearing.

The bartenders told Agent Louie that neither of them had served the young women any alcoholic beverages, and that they only noticed them sitting in the booth right before the doorman was starting to check IDs, about five minutes before the agents began talking to them. (RT 117-118, 155.)

The bartenders were never asked when the girls arrived or how long they were there. (RT 122.) The only person in the investigation who was asked about the time of arrival was Ms. Fletcher. She stated when questioned by Agent Louie that night that

she thought they arrived at approximately 9:30 p.m. (RT 33, 53.) However, when Agent Louie was asked on cross examination whether it could have been 9:50 p.m., he answered, "correct." (RT 70.) Mr. Coit testified that based on the practices and procedures of the premises the girls could not have been there more than five minutes (RT 121) and that the allegation that they had been there since 9:30 p.m. is not accurate. (RT 119-120.)

Testimony established that one of the young women had a glass of water in front of her and one (Ms. Tringali) had a glass of beer on the table in front of her. (RT 58; exh. 2.) In the photograph labeled exhibit 2 the glass of beer appears approximately 3/4 full. Four boxes of pizza are also shown in the photograph, despite the fact that the premises does not sell pizza. None of the individuals appear to be consuming pizza, and testimony established that individuals who bring food in from outside are asked to leave. No explanation was given for how the glass of beer came to be on the table or where the pizza came from. There is no video surveillance in the premises to answer these questions. (RT 48.)

Appellant is not charged with selling or providing alcohol to a minor. The Department only cites the presence of the beer as evidence that the minors had been permitted to remain long enough in the premises to constitute a violation of section 25665. The Department's decision, in Determination of Issues, paragraph nine, concludes that the fact the glass of beer is "half-full" is proof that the minors had been in the premises for half an hour. An examination of the photograph taken that night, however, shows that this "half-full" determination is contrary to the photographic evidence (exh. 2.), and no evidence was presented to establish that "half-full" equates to 30 minutes.

Each of the minors named in the accusation were called as witnesses by the Department as mandated by Business and Professions Code section 25666. The ALJ questioned each of the minors about any pending criminal matter related to the subject of their testimony, prior to allowing the parties to examine the witnesses. Each minor separately claimed they would not answer any question that would tend to incriminate them during the pendency of similar charges in criminal court. Accordingly, the ALJ indicated further questioning from the parties would not be permitted. The ALJ also asked if the parties wished to continue the matter until the charges had been resolved but the Department said no. (RT 102.)

On September 10, 2019, the ALJ submitted a proposed decision finding that cause for discipline against the license did not exist and recommending that all three counts of the accusation be dismissed. The Department notified the parties that it was rejecting the proposed decision and would decide the case itself pursuant to Government Code section 11517(c). In that Notice, it asked the parties to submit briefs addressing the following questions:

Under the facts of this case, how long must have a minor been in the licensed premises to create a violation of section 25665?

What evidence in the record shows that employees of the licensed premises knew or should have known that there was a violation of section 25665 occurring?

Is the department permitted to use the hearsay testimony at issue to establish the time when the group entered the Licensed Premises?

What is the effect, if any, of the witnesses refusing to testify through invoking their fifth amendment right have upon the evidentiary weight given to the above hearsay testimony?

What evidence on the record supports the finding there was a violation of section 25665 in this case?

(Notice Pursuant To Government Code Section 11517(c)(2)(E), dated January 24, 2020.) Both parties submitted briefs.

On April 16, 2020, the Department issued its Decision Pursuant to Government Code Section 11517(c), sustaining all three counts of the accusation and imposing a 10-day suspension of the license (with 5 of those days conditionally stayed for one year) for each count. The suspensions are to run concurrently.

Appellant then filed a timely appeal raising the following issues: (1) the Department committed prejudicial error in admitting the hearsay statement of one of the minors to establish the time of their arrival, (2) there are no hearsay exceptions which allow for the admission of this hearsay statement, (3) allowing minors to remain in the premises briefly does not establish a violation of section 25665, and (4) the admissible evidence presented does not establish a violation of section 25665. These issues will be discussed together.

DISCUSSION

Business and Professions Code 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. . .

(Bus. and Prof. Code § 25665, emphasis added.) Appellant contends that substantial evidence is lacking to support the charge that it permitted the minors in this case to remain in the premises for a long enough period to constitute a violation of section 25665. (AOB at p. 21.)

In particular, appellant contends the only evidence to support the Department's decision is the inadmissible hearsay statement of one of the minors to Agent Louie that

she and the others arrived at about 9:30 p.m. and that this alone is not sufficient to support the findings. (AOB at p. 15.)

Government Code section 11513(d) provides:

Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration.

Although no hearsay objection was made at the hearing, a hearsay objection was timely made in the brief submitted by appellant following the Department's rejection of the proposed decision. The Department acknowledges this timely objection in Determination of Issues, paragraph 7 of its decision. Appellant contends there is not substantial evidence to support the charges because only inadmissible hearsay evidence supports the findings. (AOB at p. 11.)

"The mere admissibility of evidence does not necessarily confer the status of 'sufficiency' to support a finding absent other competent evidence." (*Snelgrove v. Dep't of Motor Vehicles* (1987) 194 Cal.App.3d 1364, 1373 [240 Cal.Rptr. 281].)

On this point, the United States Supreme Court has noted that the "assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. ***Mere uncorroborated hearsay or rumor does not constitute substantial evidence.***" [Citation.] This court has also taken the position that "[there] must be substantial evidence to support such a board's ruling, and hearsay, unless specially permitted by statute, is not competent evidence to that end. [Citations.]" [Citation.]

(*Daniels v. Dep't of Motor Vehicles* (1983) 33 Cal.3d 532, 536-537 [189 Cal.Rptr. 512], emphasis added.)

In determining whether a decision of the Department is supported by substantial evidence, this Board's review is limited to determining, in light of the entire

administrative record, whether substantial evidence exists — even if contradicted — to reasonably support the Department’s factual findings, and whether the decision is supported by those findings. (*Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113] (*Boreta*.) The Board is bound by the factual findings of the Department. (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1963) 212 Cal.App.2d 106, 113 [28 Cal.Rptr. 74] (*Harris*.) A factual finding of the Department may not be disregarded merely because a contrary finding would have been equally or more reasonable. (*Boreta, supra*, at p. 94.) The Board may not exercise independent judgment regarding the weight of the evidence; it must resolve evidentiary conflicts in favor of the Department’s decision and view the whole record in a light most favorable to the decision. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].) The Board must accept all reasonable inferences from the evidence which support the Department’s decision. (*Harris*, at p. 113.)

“Substantial evidence” is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. N.L.R.B.* (1951) 340 U.S. 474, 477 [71 S.Ct. 456].)

Substantial evidence, of course, is not synonymous with “any” evidence, but is evidence which is of ponderable legal significance. It must be “reasonable in nature, credible, and of solid value; it must actually be ‘substantial’ proof of the essentials which the law requires in a particular case.” [Citations.] Thus, the focus is on the quality, not the quantity of the evidence. Very little solid evidence may be “substantial,” while a lot of extremely weak evidence might be “insubstantial.”

(*Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647] (*Toyota*.)

Both appellant and the Department cite the same case to support their positions: *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*. It explained and distinguished *Ballesteros*, 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*, *supra* at p. 1255.)

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

[T]he 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*, *supra* 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, supra* 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, supra* at p. 1256.)

Here, the Department has not established that the bartenders were "inactive or passive" (*CMPB Friends, supra* at p. 1255, quoting *Ballesteros, supra*, 234 Cal.App.3d at p. 701). In fact, two bartenders serving up to 40 customers, all of whom must come

to the bar to order their drinks, was noted as the possible reason the bartenders were not interviewed on the night of the investigation — because they were so busy.

Rather than establishing that the bartenders were “inactive or passive,” the decision instead makes assumptions about how long the minors were in the premises to imply that the bartenders permitted the minors to enter and remain in violation of section 25665. If one ignores the Department’s reliance on the hearsay statement of the minor, however, and looks only at the facts that are supported by substantial evidence, it is just as probable that the minors entered the premises three or four minutes before the agents and only a few minutes before the doorman was about to do his sweep of the premises to check IDs.

As ALJ Sakamoto observed in his proposed decision (which the Department considered and rejected):

8. Thus, reliable evidence established only that the Delli-Gotti [*sic*] sisters, Tringali, and Fletcher were on the Licensed Premises only from when the agents first observed them seated at their booth until when Agent Louie checked their respective identifications. That time span lasted only a few minutes at most. It was neither sufficiently established what Respondent’s employees were doing during that time nor was it sufficiently established they acted so passively with respect to the presence of Fletcher, Tringali, and Sophia Delli-Gatti to conclude they permitted those minors to enter and remain on the licensed premises in violation of section 25665.

(Proposed Decision, Det. of Issues, ¶ 8.) We agree with ALJ Sakamoto’s assessment of the evidence.

The Department’s decision fails to consider any other circumstances of the incident such as the number of patrons and employees, or evidence of what the bartenders were doing at the time to service up to 40 patrons, all of whom had to order their drinks at the bar. Under the CMPB test, the bartenders were not inactive or

passive, given all they were expected to do and given the fact that the doorman was about to do a sweep of the premises to check IDs. The Department simply used what is essentially a strict liability standard — the minors were in the premises without lawful business, therefore the bartenders and, by imputation, appellant, permitted them to do so and violated section 25665 — this is an incorrect standard.

In the present case, the Department bases its decision in large part on the hearsay statement of one minor who allegedly told Agent Louie that she and her friends arrived at the premises at 9:30 p.m. The hearsay statement is admissible as administrative hearsay — as defined in Government Code section 11513(d) and the Code of Regulations, section 7429, subdivision (f)(4) — not for the truth of the matter stated, but “for the purpose of supplementing or explaining other evidence.” (§ 11513, subd. (d); Cal. Code Regs., tit. 2, § 7429, subd. (f)(4).)

The “other evidence” which is being supplemented or explained by the hearsay statement includes: the statement by Agent Louie that he and the other agents were in the bar for seven to ten minutes before questioning the minors (RT 66; Det. of Issues, ¶ 6), the Department’s analysis of exhibit 2 — the photograph depicting the minors — as showing the glass of beer to be half-empty (Det. of Issues, ¶ 9), and the Department’s conclusion that a half-empty glass of beer indicated the minors had been in the premises “for a significant period of time” of “up to 20 minutes or more prior to Agent Louie first observing them.” (Det. of Issues, ¶ 9.)

This “other evidence” cited by the Department is contradicted in the record. First, the record is clear that the agents entered the premises at 9:53 or 9:54 p.m. (RT 11, 36, 116) and the citations issued to the minors showed a violation at 9:57 p.m. (RT 39, 115), three or four minutes later. This simply does not support Agent Louie’s

statement, adopted as fact by the Department, that he was in the premises for seven to ten minutes before approaching the minors.

Furthermore. Agent Louie himself stated (in regards to questioning about the hearsay statement):

Q. (BY MR. RAMIREZ) But you believed her about the 9:30?

A. (BY AGENT LOUIE) Yes.

Q. And I believe, when I asked you questions, you said it could have been -- you didn't press her on that?

A. Correct.

Q. It could have been 9:50?

A. Correct.

(RT 69-70.) In short, even the agent admits that the 9:30 p.m. time is speculative, and that it could just as easily have been 9:50 p.m. when the minors arrived — three minutes before the agents themselves arrived — as ALJ Sakamoto noted in his proposed decision.

The testimony of Mr. Coit further undermines the “other evidence” used by the Department:

Q. (BY MR. RAMIREZ) Now, we had some testimony that one of the minors told Agent Louie that they had been there since around 9:30 that night. With your conversations with your bartenders and your doorman, do you believe that to be an accurate estimate of how long they had been there?

A. (BY MR. COIT) No, I don't believe 9:30 is an accurate time.

Q. And what leads you to that?

A. If my bartenders had seen four people sitting at a booth without product -- they are trained to approach them, as I said before, in a reasonable amount of time. We don't allow loitering. We don't allow people to come in and hang out. It is business. If you're not drinking, we ask that you – if

they're a designated driver, that's one thing, but even a designated driver needs their ID checked, so... Yeah, I don't think 9:30 would be -- would be accurate. They wouldn't let them sit there at that table for that long.

Q. And you said they [the bartenders and doorman] had an estimate of five minutes?

A. About five minutes, yes.

(RT 119-120.)

Finally, and most importantly, the Department heavily relies on exhibit 2 and the notion that the photograph shows a half-empty glass of beer. We disagree. At most, the glass of beer appears to be one-quarter empty — or less, depending upon how full the glass was to begin with. Since there is no evidence whatsoever to establish where the beer came from, how can the Department say the glass was ever full? And if it was never full, how can a glass photographed when three-quarters or even one-half full establish that the person has possessed it for a certain period of time? Perhaps the beer was smuggled in and put in a water glass, or perhaps it was handed to the minor by someone at an adjoining table, or left behind by a previous customer, or any of a number of other speculative positions. All such speculative theories are completely insufficient to be relied upon as “other evidence” which the hearsay statement may supplement or explain. Accordingly, the hearsay statement should not have been admitted, much less relied on as the basis of the Department’s case.

Alternatively, the Department maintains the hearsay statement of the minor is admissible under the hearsay exception in Evidence Code section 1224 which provides:

When the liability obligation, or duty of a party to a civil action is based in whole or in part upon the liability, obligation, or duty of the declarant, or when the claim or right asserted by a party to a civil action is barred or diminished by a breach of duty by the declarant, evidence of a statement made by the declarant is as admissible against the party as it would be if offered against the declarant in an action involving that liability, obligation, duty, or breach of duty.

Cases upholding the applicability of section 1224 involve guarantors, sureties, insurers, shareholders. As appellant notes, in these situations the admissions of the declarant — who has virtually the same interests, motive, and means for obtaining knowledge as the party — are likely to be equally worthy of consideration as the admissions of the party himself. (Citing *Markley v. Beagle* (1967) 66 Cal.2nd 951, 959-960 [59 Cal.Rptr. 809].) In the instant case, by contrast, there is no relationship, let alone any identity of interests, between Ms. Fletcher and appellant. She is not an agent, an employee, or anything other than a mere customer. To allow statements, allegedly attributed to her, to be ascribed to appellant would impose a responsibility that the law simply does not recognize. (AOB at p. 17.) We agree with appellant that this hearsay exception is not applicable in this case.

To justify reversal, an error must be prejudicial, and it must appear that a different result would have been probable if such error did not exist. (Code Civ. Proc., § 475; see *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 104 [87 Cal.Rptr.2d 754] (*Paterno*).) There is no presumption of injury from an error, and the burden is on the appellant to show that the error was sufficiently prejudicial to justify reversal. (*Kyne v. Eustice* (1963) 215 Cal.App.2d 627, 635-636 [30 Cal.Rptr 391]; see *Paterno, supra* at p. 106 [Appellant has the burden “of spelling out in his brief exactly how the error caused a miscarriage of justice”].)

In the instant case, appellant has made a strong case that the hearsay statement should not have been admitted to supplement or explain “other evidence” when that other evidence is shown to be weak and unreliable. Here, the Department relies on the testimony of Agent Louie from one portion of the transcript to say he was in the premises for seven to ten minutes before approaching the minors, while ignoring his

contradictory testimony which establishes that he was only in the premises for three to four minutes before doing so. Further, the Department presents the hearsay testimony that the girls arrived at about 9:30 p.m. as reliable, and for the truth of that statement — in spite of Agent Louie’s admission that they could have come in as late at 9:50 p.m., and the fact that the statement is not corroborated by any other evidence. Most damagingly, the Department engages in pure speculation about a “half-full” glass of beer as evidence of having been in the premises for a period of time, with no foundation for any of that speculation. The combination of these errors constitutes a miscarriage of justice.

Findings must be supported by substantial evidence which is “reasonable in nature, credible, and of solid value; it must actually be ‘substantial’ proof of the essentials which the law requires in a particular case.” (*Toyota, supra* at p. 871.) The speculative findings in the Department’s decision do not meet this substantial evidence standard.

As noted above, while Government Code section 11513(d) states that “hearsay evidence may be used for the purpose of supplementing or explaining other evidence.” It also contains the proviso that it “shall not be sufficient in itself to support a finding.” Here, the Department’s decision is based on the flimsy reed of hearsay evidence and a reliance on assumptions, rather than substantial evidence. This is insufficient to support the findings underlying the decision and constitutes prejudicial error.

ORDER

The decision of the Department is reversed.⁴

SUSAN BONILLA, CHAIR
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.

APPENDIX

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF THE APPEAL BY:

MATTHEW COIT ENTERTAINMENT, LLC.
DBA: MC GOVERN'S IRISH PUB
215 E 4TH AVE
SAN MATEO, CA 94401

ON-SALE GENERAL PUBLIC PREMISES -
LICENSE

SAN FRANCISCO DISTRICT OFFICE

File: 48-577488

Reg: 19088575

AB: 9883

Respondent(s)/Licensee(s)
under the Alcoholic Beverage Control Act.

CERTIFICATION

I, Yuri Jafarinejad, do hereby certify that I am a Senior Legal Analyst for the Department of Alcoholic Beverage Control of the State of California.

I do hereby further certify that annexed hereto is a true, correct and complete record (not including the Hearing Reporter's transcript) of the proceedings held under Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code concerning the petition, protest, or discipline of the above-listed license heretofore issued or applied for under the provisions of Division 9 of the Business and Professions Code.

IN WITNESS WHEREOF, I hereunto affix my signature on July 16, 2020, in the City of Sacramento, County of Sacramento, State of California.



Office of Legal Services

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

**IN THE MATTER OF THE ACCUSATION
AGAINST:**

Matthew Coit Entertainment, LLC
Db: McGovern's Irish Pub
215 E. 4th Ave.
San Mateo, CA 94401

Respondent

On-Sale General Public Premises License

File No.: 48-577488

Reg. No.: 19088575

DECISION UNDER GOVERNMENT CODE SECTION 11517(c)

The above-entitled matter having regularly come before the Department on April , 2020, for decision under Government Code Section 11517(c) and the Department having considered its entire record, including the transcript of the hearing held on June 5, 2019, before Administrative Law Judge David W. Sakamoto, and the written argument of the parties, and good cause appearing, the following decision is hereby adopted:

Matthew Gaughan, Attorney, Office of Legal Services, Department of Alcoholic Beverage Control, appeared for and represented the Department of Alcoholic Beverage Control. (The Department.)

Donald A. Ramirez, attorney-at-law, appeared for licensee-respondent, Matthew Coit Entertainment, LLC. (Respondent.)

After evidence was received at the hearing, the matter was argued by the parties and submitted for decision on June 5, 2019. The Administrative Law Judge issued a proposed decision dated September 10, 2019, which was rejected by the Director by Notice dated November 4, 2019. Written arguments were submitted on or about March 9, 2020, by both the Department and Respondent.

As specified in the Department's accusation, it alleged cause for suspension or revocation of Respondent's license exists under California State Constitution, Article XX, section 22, and Business and Professions Code section 24200, subdivision (a) and (b), based on the following grounds:¹

Count 1: "On or about January 25, 2019, respondent-licensee's agents or employees, Javier Alexander Magallon, Jeanett Lea Divinagracia, and Ralph Nobleza, permitted Sophia Lynn Delli-Gatti, a person under the age of 21 years, to enter and remain in the licensed premises without lawful business therein, in violation of Business and Professions Code Section 25665." (Exhibit 1:Pre-hearing pleadings)

Count 2: "On or about January 25, 2019, respondent-licensee's agents or employees, Javier Alexander Magallon, Jeanett Lea Divinagracia, and Ralph Nobleza, permitted Jaqueline Savannah Fletcher, a person under the age of 21 years, to enter and remain in the licensed premises without lawful business therein, in violation of Business and Professions Code Section 25665."

Count 3: "On or about January 25, 2019, respondent-licensee's agents or employees, Javier Alexander Magallon, Jeanett Lea Divinagracia, and Ralph Nobleza, permitted Samantha Jo Tringali, a person under the age of 21 years, to enter and remain in the licensed premises without lawful business therein, in violation of Business and Professions Code Section 25665."

FINDINGS OF FACT

1. The Department filed its accusation on February 28, 2019. On March 14, 2019, the Department received Respondent's Notice of Defense requesting a hearing on the accusation.
2. On April 11, 2017, the Department issued Respondent a type-48 on-sale general public premises license for its premises known as McGovern's Irish Pub at 215 E. 4th Avenue, San Mateo, California. (Hereafter the Licensed Premises.) Respondent's type-48 license permits it to retail in beer, wine, and distilled spirits for consumption on the licensed premises. With few exceptions, no minors are allowed on the licensed premises.
3. No evidence established Respondent suffered any prior disciplinary action at the Licensed Premises.
4. On January 25, 2019, at approximately 9:53 p.m., Alcoholic Beverage Control Agents Louie, Ott, and Cook went to the Licensed Premises in an undercover capacity.² The

¹ All further section references are to the California Business and Professions Code unless noted otherwise.

² The agents' report of the incident indicated their time of arrival was 9:54 p.m.

Licensed Premises was open and operating. There were approximately 20-40 patrons already present. The Licensed Premises had a bar counter, approximately six booths for seating, some video games, and a pool table.

5. When the agents entered the Licensed Premises, there was no doorman at the entrance they used. Once inside, they walked around and looked for any obviously intoxicated patrons or persons under 21 years old.

6. Approximately 7-10 minutes after their entry into the Licensed Premises, the agents focused on two groups of youthful appearing people who occupied two adjacent booths. Agents Ott and Cook checked one group at one booth for their ages, while Agent Louie contacted the second group sitting in the adjacent booth. That booth consisted of four youthful appearing women identified as Jaqueline Savannah Fletcher (Fletcher), Samantha Jo Tringali (Tringali), Jaqueline Michelle Delli-Gatti (Jaqueline Delli-Gatti), and her sister, Sophia Lynn Delli-Gatti (Sophia Delli-Gatti). Agent Louie identified himself to them as an ABC Agent and indicated he wanted to check their identifications.

7. Agent Louie inspected the identification presented by Jaqueline Delli-Gatti. He determined she was at least 21 years old.

8. Agent Louie inspected the identification presented by Sophia Delli-Gatti. Her identification appeared authentic to Agent Louie and he returned it to her. It indicated she was at least 21 years old.

9. Agent Louie inspected the identification presented by Tringali. Agent Louie questioned Tringali about her identification because it contained a photo of her but with a different hair color. Agent Louie concluded the identification acceptable and it indicated she was at least 21 years old. He returned it to Tringali. Prior to stopping at the minors' table, Agent Louie saw Tringali sip from a glass of beer that was on the table.³

10. Agent Louie inspected the identification presented by Fletcher. Her identification appeared suspicious. Its printing was not clear and its finish too shiny. Agent Louie told Fletcher lying to the police was worse than having a false identification. Fletcher admitted she gave Agent Louie a false identification and that she was only 19 years old. She had no authentic identification with her then. Agent Louie's check with the California Highway Patrol (hereafter CHP) indicated Fletcher's birthdate was May 12, 1999. Fletcher told Agent Louie that the four of them came into the premises at approximately 9:30 p.m. and there was no doorman, so they did not show their identification to anyone that night.

11. Agent Ott joined Agent Louie, and she re-inspected Sophia Delli-Gatti's identification. Agent Ott believed it was not authentic. Ultimately, Sophia Delli-Gatti admitted to the

³ No evidence was presented to establish exactly how Tringali's beer ended up at the table.

agents that she gave them a false identification and gave Agent Ott a valid California Driver License that indicated Delli-Gotti's date of birth was February 21, 1999. She was, therefore, only 19 years old.

12. The agents issued a citation to Sophia Delli-Gotti for being a minor in a public premises and for possession of a false identification. The citation indicated the time of violation was 9:57 p.m. Agent Louie testified that he typically inserts the time on citations that he observes a violation. As such, the 9:57 p.m. reflects the time that Agent Louie first observed the group, including the minors, not the time the citation was actually issued.

13. The agents issued a citation to Fletcher for being a minor in a public premises and for possession of a false identification.

14. A few days later, Agent Louie checked with the CHP regarding the identification Tringali presented to him on January 25, 2019. He had taken a photo of Tringali's identification before he returned it to her that night. The CHP indicated they had no record of the identification Tringali showed Agent Louie, but they did have a record of a valid driver license issued to Tringali that indicated she was born on November 9, 1999. That made her only 19 years old as of January 25, 2019. Agent Louie did not thereafter issue Tringali a citation for any violation.

15. The booth where the four women were seated was approximately 15-20 feet from the Licensed Premises' bar counter.

16. On the night of the investigation, Agent Louie was contacted by the Licensed Premises doorman, Ralph Nobleza. (Nobleza.) Nobleza identified himself as the doorman and indicated he began checking patrons' identifications when his shift began at 10:00 p.m. He had not checked the identifications of the four women Agent Louie questioned because they were there before Nobleza arrived to begin his 10:00 p.m. shift.

17. A few days later, on February 5, 2019, Agent Louie spoke by phone with Respondent's bartender, Javier Magallon. (Magallon.) Magallon told Agent Louie he recalled the four women at the table, and that one of them had a beer. He denied he served them any beer. He said that he asked the other bartender, "Jeannett," if she had checked their identifications and she said she had not.

18. On February 6, 2019, Agent Louie spoke by phone with bartender Jeannett Lea Diviniagracia (Diviniagracia) who told Agent Louie that she had not checked the women's identifications and that bartender Magallon told her that he had not checked their identifications either. Diviniagracia indicated that none of the four women came up to the bar counter. She added she and Magallon did not know how the glass of beer ended up at the minors' table.

19. Minors Fletcher, Sophia Delli-Gatti, and Tringali were all called by the Department as witnesses at the hearing.⁴ The Department indicated that one or more minors might decline to testify at the hearing to avoid incriminating themselves. The ALJ had each minor take the stand and be sworn in. The ALJ made some preliminary inquiries regarding who their counsel was, when they last conferred with their counsel, and what they were directed to do. At the direction of their respective counsel, each of them claimed the privilege not to testify at the hearing to avoid self-incrimination. The ALJ concluded each claim of privilege was timely, had merit, and was appropriate under Government Code section 11513, subdivision (e).⁵ None of the three minors testified as to the facts and circumstances concerning their presence and activities at the Licensed Premises and the ALJ excused them from the hearing. They were advised they might be called to testify at a later date.

20. Matthew Coit, owner of the Respondent corporation, has been the licensee at the Licensed Premises for approximately two years.⁶ He has been licensed at a second type-48 on-sale general public-premises also in San Mateo for approximately the past six years. He has not suffered any disciplinary action at either location. He has taken the Department's LEAD⁷ training class three times and also has a "guard-card."

21. Coit testified he directed his bartenders to check the identifications of those patrons who did not appear at least 40 years old. He hired bartenders he believed would be capable of dealing with patrons in checking their identifications as needed. His bartenders must attend the Department's LEAD class too. As of January 25, 2019, bartender Diviniagracia and door man Nobleza had already completed the LEAD class. Bartender Magallon had not yet taken the class but completed it sometime after January 25, 2019.

22. Coit testified that when no doorman was working, bartenders were directed to check the identifications of anyone who came to the counter for an alcoholic beverage. They only

⁴ Under section 25666, when a violation of section 25665 has been charged, the Department is generally required to present the involved minor at the hearing for examination. The Department met its statutory obligation in this respect.

⁵ Government Code section 11513, subdivision (e), states: "The rules of privilege shall be effective to the extent they are otherwise required by statute to be recognized at the hearing." Evidence Code section 940 states: "To the extent that such privilege exist under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him." Sophia Delli-Gatti and Fletcher indicated they had not yet resolved their criminal citations. Tringali, although not cited by the agents, was still in criminal jeopardy as the criminal one-year statute of limitations under Penal Code section 802, subdivision (a), had not run as to possessing a false identification in violation of section 25661, a misdemeanor, and being a minor on a public premises in violation of section 25665, also a misdemeanor.

⁶ Matthew Coit was Respondent's only witness.

⁷ It was assumed LEAD meant the Department's Licensee Education on Alcohol and Drug class.

served one drink per identification checked. If someone ordered more than one drink, the bartenders were instructed to check the identifications of those patrons for whom the additional drinks were being served. If a pitcher of beer was ordered for a group, then the bartender was to ensure all in the group were at least 21 years old. Respondent's employees also had access to small "black lights" with an attached magnifying glass to assist in examining identifications presented to them. If the patron checked was at least 21, the patron's hand was stamped by the bartender or doorman.⁸

23. On weekend nights, doormen staffed the entrance beginning at 10:00 p.m. and would thereafter systematically work their way through the patrons inside the premises to verify all were at least 21 years old. The doorman would hand stamp all those patrons he determined were at least 21 years old. On January 25, 2019, Nobleza was the doorman assigned to work that night, beginning at 10:00 p.m. and work until 2:00 a.m., after which he also helped with cleaning up the Licensed Premises for the night.

24. Coit testified that the local police department told him at one time that 10-15 minutes should be a sufficient time-window during which he should be able to detect any underage person in the Licensed Premises.

25. After the January 25, 2019 incident, Coit met separately with bartenders Magallon and Diviniagracia about what happened that night.⁹ They told him that they saw the group at the table "right before they were approached" by the agents. He later testified that the bartenders also said that "within five minutes of the agents being there, they noticed them at the table." However, Coit also testified that the bartenders said "they had noticed the girls at the table and, within a couple of minutes, the bouncer was in the building, ready to go and about to start making his sweep, so they thought that they could – they thought they had enough time for Ralph [the doorman] to go over and check their IDs." Each informed him they conferred with one another that night about noticing the group of four women at the table and that there was a beer there. Magallon and Diviniagracia each denied to the other that they had served beer at that table and concurred that neither of them had yet checked the womens' identifications. Coit opined that the minors were only there a short time because if the minors were there any longer, his bartenders /or doorman would have become aware of them and verified their age prior to when Agent Louie contacted them.

26. Coit also speculated that the reason why the group had a glass of beer and a glass of water on the table was because they must have brought in with them. In support of this theory, Coit asserted that it has been known to happen that patrons would bring a bottle of beer in with them, get a glass of water, go to the restroom to pour the water out and replace it with the beer. There is no evidence that this occurred on this occasion.

⁸ There was no evidence that any of the minors' hands were stamped.

⁹ Neither Magallon nor Diviniagracia nor Nobleza testified at the hearing.

LEGAL BASIS OF DECISION

1. Article XX, section 22 of the California Constitution and Business and Professions section 24200, subdivision (a), provides that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.

2. Business and Professions Code section 24200, subdivision (b), provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.

3. Business and Professions Code Section 25660 provides that: "(a) Bona fide evidence of majority and identity of the person is any of the following:

"(1) A document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a valid motor vehicle operator's license, that contains the name, date of birth, description, and picture of the person.

"(2) A valid passport issued by the United States or by a foreign government.

"(3) A valid identification card issued to a member of the Armed Forces that includes a date of birth and a picture of the person.

"(b) Proof that the defendant-licensee, or his or her employee or agent, demanded, was shown, and acted in reliance upon bona fide evidence in any transaction, employment, use, or permission forbidden by Section 25658, 25663, or 25665 shall be a defense to any criminal prosecution therefor or to any proceedings for the suspension or revocation of any license based thereon."

4. Business and Professions Code section 25661 states: (a) Any person under the age of 21 years who presents or offers to any licensee, his or her agent or employee, any written, printed, or photostatic evidence of age and identity which is false, fraudulent, or not actually his or her own for the purpose of ordering, purchasing, attempting to purchase, or otherwise procuring or attempting to procure, the serving of any alcoholic beverage, or who has in his or her possession any false or fraudulent written, printed, or photostatic evidence of age and identity, is guilty of a misdemeanor and shall be punished by a fine of at least two hundred fifty dollars (\$250), no part of which shall be suspended; or the person shall be required to perform not less than 24 hours nor more than 32 hours of community service during hours when the person is not employed and is not attending school, or a combination of fine and community service as determined by the court. A second or subsequent violation of this section shall be punished by a fine of not more than five hundred dollars (\$500), or the person shall be required to perform not less than 36 hours or more than 48 hours of community service during hours when the person is not employed or is not attending school,

or a combination of fine and community service, as the court deems just. It is the intent of the Legislature that the community service requirements prescribed in this section require service at an alcohol or drug treatment program or facility or at a county coroner's office, if available, in the area where the violation occurred or where the person resides.

(b) The penalties imposed by this section do not preclude prosecution or the imposition of penalties under any other provision of law, including, but not limited to, Section 13202.5 of the Vehicle Code.

5. Business and Professions Code Section 25665 provides: "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. Any person under the age of 21 years who enters and remains in the licensed public premises without lawful business therein is guilty of a misdemeanor and shall be punished by a fine of not less than two hundred dollars (\$200), no part of which shall be suspended."

6. Section 25666 states, "(a) In any hearing on an accusation charging a licensee with a violation of Sections 25658, 25663, and 25665, the department shall produce the alleged minor for examination at the hearing unless he or she is unavailable as a witness because he or she is dead or unable to attend the hearing because of a then-existing physical or mental illness or infirmity, or unless the licensee has waived, in writing, the appearance of the minor. When a minor is absent because of a then-existing physical or mental illness or infirmity, a reasonable continuance shall be granted to allow for the appearance of the minor if the administrative law judge finds that it is reasonably likely that the minor can be produced within a reasonable amount of time.

"(b)(1) Nothing in this section shall prevent the department from taking testimony of the minor as provided in Section 11511 of the Government Code .

"(2) This section is not intended to preclude the continuance of a hearing because of the unavailability of a minor for any other reason pursuant to Section 11524 of the Government Code.

DETERMINATION OF ISSUES

1. As to Count 1, 2, and 3, cause for suspension or revocation of Respondent's license exists under Article XX, section 22 of the California State Constitution and Business and Professions Code sections 24200(a), because it was sufficiently established that on January 25, 2019, Respondent's employees Javier Alexander Magallon, Jeanett Lea Diviniagracia, and Ralph Nobleza permitted Sophia Lynn Delli-Gatti, Jaqueline Savannah Fletcher, and Samantha Jo Tringali, each then being under 21 years of age, to enter and remain on the licensed premises without lawful business in violation of Business and Professions Code section 25665.

2. As in *CMPB Friends, Inc. v. Alcoholic Beverage Control Appeals Board* (2002) 100 Cal.App.4th 1250, the issue here is what constitutes permitting a minor to remain on the premises. In *CMPB Friends* the Department found the licensee to have violated section 25665 after a minor was found to have been inside the licensed premises for some 40 minutes. The evidence established that there was one waitress on duty and that there were between 40 and 60 patrons in the premises. The waitress noticed the minor walk through the premises and sit at a table. Within about 10 minutes, the waitress approached the minor and requested identification (which turned out to be fake). Department investigators entered the premises approximately 30 minutes later, observed the minor, and requested identification, determining her to be under the age of 21. In taking disciplinary action, the Department focused on the 10-minute delay between the waitress noticing the minor before requesting identification from her. Due to that delay, the Department determined that the licensee had permitted the minor to remain in the licensed premises in violation of section 25665.
3. The court compared that case to the situation in *Ballesteros v. Alcoholic Beverage Control Appeals Board* (1965) Cal.App.2d 694. In *Ballesteros*, the single bartender on duty did not check identifications of all members of a party that had entered the premises because he was familiar with some members of the group, including the minor's husband. After serving some members of the group at the bar, the bartender did not thereafter approach the party's table or otherwise notice the presence of the minor. A police officer entered the premises "a few minutes" later, approached the minor's table, and determined that she was under 21. Based upon those facts, the court found that the bartender was "inactive or passive" with respect to his duty to ascertain the minor's age, and so had effectively permitted the minor to remain in the premises for "at least ten minutes."
4. In *CMPB Friends*, the court stated that in *Ballesteros* "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 [the minor's] presence in the Royal Room to go unnoticed and unchallenged. Rather, upon detecting [the minor's] presence, the waitress attempted to ensure that [the minor] was at least 21 years old. 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 [the minor] to remain on the premises." Because no findings had been made in that regard, the matter was remanded to the Department for further proceedings.
5. In remanding the matter, the court made two important observations relevant to the issue to be determined here. First, the court was clear that it did not intend to suggest that licensees need not remain vigilant as to the ages of their patrons. An on-sale licensee has an affirmative duty to ensure that minors are not permitted to enter and remain in their premises in violation of section 25665. Second, the particular facts of a case matter and there is "no set period of time in which a violation occurs." While a 10-minute delay in *Ballesteros* supported finding a violation, in *CMPB Friends*, "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.”

6. In the instant case, the facts support a determination that the minors were present prior to contact by the agents (1) for approximately 30 minutes, based on the hearsay statement of Fletcher and supporting evidence, or (2) a period of 7-10 minutes if based solely on the direct observation of the agents and supporting evidence. In either case, there was sufficient evidence to show that Respondent’s employees were not diligent in their duties and thus sufficient to establish a violation.

7. As to the evidence that the minors were present for approximately 30 minutes at the time the agents contacted them, Agent Louie testified that on the night of the investigation, Fletcher told him her group of four women entered the Licensed Premises at approximately 9:30 p.m., that there was no door man, and that no one checked their identifications upon their entry.¹⁰ No hearsay objection was made at hearing regarding Agent Louie’s testimony reciting Fletcher’s statement. However, upon review after rejection of the proposed decision, an objection has been asserted.¹¹

8. Under Government Codes section 11513, subdivision (d): “Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration.” In this instance, Fletcher’s hearsay statement regarding details of exactly when and how her group entered the Licensed Premises may be relied upon either as administrative hearsay (to supplement or explain other evidence) or as falling under an exception to hearsay.

9. Agent Louie testified that he and the other agents entered the premises at 9:53 p.m. Agent Louie observed the group, including the minors, seated at a booth in the premises, with two glasses (one of water, one of beer) on the table. These are direct observations by Agent Louie. In addition, Exhibit 2, the photo showing the two glasses and four boxes of pizza on the table in addition to the four female patrons, clearly shows that the glass of beer

¹⁰ It is noted that minors are not allowed, with some narrow exceptions, to enter and remain on a public premises at all times, not just after 10:00 p.m.

¹¹ Government Code section 11513(d) provides that a hearsay objection is timely if made “before submission of the case or on reconsideration.” It is unclear whether this means an objection is timely if made in written argument following rejection of the proposed decision pursuant to Government Code section 11517(c)(2)(E). It is possible that the objection here has been waived. However, given the ultimate determination on the hearsay statement, it is unnecessary to address this issue.

is half empty. In its written argument, Respondent asserts, without any analysis, that the hearsay statement is “the only evidence submitted to establish when [Fletcher’s] group entered” the premises. If it were necessary to establish the exact time that the minors entered the premises, Respondent’s assertion might be valid. However, this ignores Agent Louie’s observations and the photographic evidence. When taken in context, Fletcher’s statement explains why Agent Louie observed them already seated at the booth with two glasses on the table in front of them. It further supplements and explains why Exhibit 2 shows that half of the glass of beer has been consumed. It thus establishes that the group had been there for a significant period of time prior to being contacted. It is not necessarily the specific time of “9:30 p.m.” that is important here, but rather that they had been there well-prior to 9:53 p.m. and for up to 20 minutes or more prior to Agent Louie first observing them. Fletcher’s statement is thus admissible as administrative hearsay.

10. Moreover, Fletcher’s statement is subject to several exceptions to the hearsay rule. Evidence Code section 1224 provides that, “When the liability obligation, or duty of a party to a civil action is based in whole or in part upon the liability, obligation, or duty of the declarant, or when the claim or right asserted by a party to a civil action is barred or diminished by a breach of duty by the declarant, evidence of a statement made by the declarant is as admissible against the party as it would be if offered against the declarant in an action involving that liability, obligation, duty, or breach of duty.” Here, the statement of Fletcher (the declarant) is admissible against Respondent (the party) because the statement involves Fletcher’s liability for being a minor in a public premises in violation of section 25665 and would be admissible if offered against Fletcher.

11. In addition, Evidence Code section 1241 provides that a statement is not made inadmissible if it is “offered to explain, qualify, or make understandable conduct of the declarant.” Fletcher’s statement here explains and makes understandable why the minors were seated in the licensed premises with beverages in front of them.

12. In its written argument, Respondent contends that Fletcher’s statement may not be used because it would be in violation of her asserted Fifth Amendment rights. First, Respondent has no standing to assert Fletcher’s rights in this regard. Second, it is unclear how a prior out of court statement implicates a non-testifying witnesses Fifth Amendment rights. Respondent does not explain this nor offer any relevant authority to support the contention.

13. Respondent further contends that it was deprived of the opportunity to cross-examine the minors because they asserted their Fifth Amendment rights. However, during the hearing, the ALJ stated that he would consider a motion to continue the hearing. While directed specifically to Department counsel, there is no indication that the ALJ would not have entertained such a request by Respondent. Neither party made such a motion. It is disingenuous now for Respondent to claim it was deprived of an opportunity to question the minors when it did not request a continuance for that purpose. Indeed, the failure to make such a motion constitutes a waiver of this issue.

14. The photo of the group seated in the booth (Exhibit 2) shows the glass of beer and the glass of water that were observed on the table. The glass of beer is half empty. Although the Department did not object to the hearsay statements of the bartenders, by which they claimed that neither of them served any of the group, such statements are of little probative value. The inference from them is that the minors must have brought both the glass of beer and the second glass of water into the premises with them. Coit, however, suggested that they may have brought a bottle of beer in, obtained a glass of water, and poured the beer into the glass in the restroom, because that had happened before. First, this is pure speculation. Second, if that is what happened, the group would then have obtained two glasses of water from the bar before emptying one of them and replacing the water with beer. It is more reasonable to conclude that they obtained the drinks while inside the premises. In any event, whether the minors purchased the alcohol at the Licensed Premises (which is not charged here) or brought the alcohol in with them, in either scenario the minors would have been inside the premises for an extended period prior to the Agents observing them.

15. As to the evidence that does not involve Fletcher's hearsay statement, it is undisputed that the minors had been in the licensed premises for at least 7-10 minutes. They were already seated in the booth when the agents arrived at approximately 9:53 p.m. The agents observed them already seated, with a glass of beer and a glass of water on the table in front of them, so it would be a reasonable inference that they arrived prior to 9:53 p.m. Although the bartenders gave three slightly different versions of when they noticed the group ("right before they were approached" by the agents, or "within five minutes of the agents being there," or "they had noticed the girls at the table and, within a couple of minutes, the bouncer was in the building, ready to go and about to start making his sweep, so they thought that they could – they thought they had enough time for Ralph to go over and check their IDs"), taken together, these three explanations indicate that the bartenders noticed the group sitting at the table at least at the same time that the agents did. They chose not to take any action. Rather, they chose to wait until the doorman came on duty at 10:00 p.m. and let him check their identifications. There was no evidence that the bartenders were serving anyone else at the bar counter or were unduly engaged in dealing with an unusual crowd at the bar. Instead, they made a decision to not act and to instead be passive in their duty. Although perhaps less than 10 minutes, this passivity constitutes a violation.

16. As the court stated in *CMPB Friends (supra)*, there is no set period of time to apply in determining whether or not a violation has occurred. Rather, it is the particular circumstances that must be evaluated in ascertaining whether efforts to ascertain a patron's age were "reasonably diligent or were so tardy under the circumstances." Even without consideration of Fletcher's hearsay statement, the undisputed facts of this case are sufficient to establish that Respondent's failure to act "for 10 or fewer minutes" is enough to establish the violation. The bartenders were well aware of the minors' presence and chose to do nothing. That is a breach of their duty and is sufficient itself to constitute a violation of section 25665.

17. Whether or not the time between when a minor enters the premises and when the licensee verifies their age and identity is reasonable under the circumstances is an affirmative defense to the violation. As such, the burden is on Respondent to present evidence in support of such an assertion. (Evidence Code section 500.) The only contention made in this case is Coit's unsubstantiated claim that the local police department told him that 10 to 15 minutes would be reasonable. Even if true, this is not an objectively reasonable amount of time in the absence of significant extenuating circumstances. In *CMPB Friends (supra)*, for example, the court pointed to an "unexpected and unusual influx of patrons" as justifying the delay there. (*Id.* at 1257.) Since Respondent has presented no evidence that would explain or justify any delay here, the defense must fail.

18. Although the violation is established based upon the undisputed evidence, it is even more clearly established when considering Fletcher's statement that the group had entered the premises at approximately 9:30 p.m. Notwithstanding the statements of the bartenders, Fletcher's statement establishes that the minors were inside the premises for a significant period of time prior to the bartenders even noticing them. Respondent offered no evidence to explain this and there is no evidence in the record upon which it could be determined that the bartenders or the doorman were in any way delayed, distracted, too busy, or otherwise engaged to such a point that it was reasonable that they did not notice the group sitting in the booth only 15-20 feet from the bar or otherwise failed to verify their age and identity.

19. The possession of false identifications by Tringali, Fletcher, and Sophia Delli-Gatti was irrelevant in this instance because it was not established any of Respondent's employees actually inspected and reasonably relied on them as proof of the minors' age.

PENALTY CONSIDERATIONS

The Department has requested a suspension of Respondent's license for 10 days, the standard penalty under Rule 144 for a violation of section 25665. Respondent argues for a mitigated penalty, if any, because the police had told Coit that 10 to 15 minutes would be a "reasonable" amount of time before checking ID, that Coit comes from a law enforcement family and takes his obligations seriously, that his employees were cooperative, that they have taken LEAD training, and that they have access to "black lights" to check IDs and check anyone who appears under 40. The Department argued that no mitigation is warranted because of the short period of licensure (two years) and that the delay before checking ID is unreasonable.

Respondent has shown an awareness of the need to ensure that minors do not enter or remain, and it has adopted policies in an effort to comply. However, the fact that the bartenders chose to simply wait until the doorman came on duty illustrates a flaw in the procedures. In contrast, Respondent has held this license for only a short period of time. On balance, some minimal mitigation is warranted.

ORDER

Counts 1, 2, and 3 of the accusation are sustained. As to each count, Respondent's type-48 on sale general license for public premises is hereby suspended for 10 days, with 5 days stayed for a period of 12 months commencing the date the decision in this matter becomes final, upon the condition that no subsequent final determination is made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred during the period of the stay. Should such a determination be made, the Director of the Department of Alcoholic Beverage Control may, in the Director's sole discretion and without further hearing, vacate the stay and impose the 5 stayed-days of suspension, and should no such determination be made, the stay shall become permanent. The suspensions ordered herein are to run concurrently.

Sacramento, California

Dated: April 16, 2020



Jacob A. Appelsmith
Director

Pursuant to Government Code section 11521(a), any party may petition for reconsideration of this decision. The Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or on the effective date of the decision, whichever is earlier.

Any appeal of this decision must be made in accordance with Chapter 1.5, Articles 3, 4 and 5, Division 9, of the Business and Professions Code. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

**IN THE MATTER OF THE ACUSATION
AGAINST:**

MATTHEW COIT ENTERTAINMENT, LLC
MCGOVERN'S IRISH PUB
215 E. 4TH AVE
SAN MATEO, CA 94401

ON-SALE GENERAL PUBLIC PREMISES -
LICENSE

Respondent(s)/Licensee(s)
Under the Alcoholic Beverage Control Act

CONCORD DISTRICT OFFICE

File: 48-577488

Reg: 19088575

CERTIFICATE OF DECISION

RECEIVED

NOV 04 2019

Alcoholic Beverage Control
Office of Legal Services

NOTICE CONCERNING PROPOSED DECISION

To the parties in the above-entitled proceedings:

You are hereby advised that the Department considered, but did not adopt, the Proposed Decision in the above titled matter and that the Department will itself decide the case pursuant to the provisions of Section 11517(c)(2)(E). A copy of the Proposed Decision has previously been sent to all parties.

The Department has requested that a transcript of the hearing be prepared. A copy of the record will be made available to you. Upon receipt of the hearing transcript, the Department will notify you of the cost of a copy of the record. At that time, you all also be advised of the date by which written argument if any, is to be submitted.

Sacramento, California

Dated: November 4, 2019



Matthew D. Botting
General Counsel

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF THE ACCUSATION AGAINST:

Matthew Coit Entertainment, LLC
Dbas: McGovern's Irish Pub
215 E. 4th Ave.
San Mateo, CA 94401

Respondent

} File: 48-577488

} Reg.: 19088575

} License Type: 48

} Word Count Estimate: 23,000

Regarding Its Type 48 On Sale General Public Premises
License Under the State Constitution and the Alcoholic
Beverage Control Act.

} Rptr: Valerie Jensen-Harris,
Atkinson-Baker Reporters
PROPOSED DECISION

Administrative Law Judge David W. Sakamoto, Administrative Hearing Office, Department of Alcoholic Beverage Control (Hereafter the ALJ), heard this matter in San Mateo, California, on June 5, 2019.

Matthew Gaughan, Attorney, Office of Legal Services, Department of Alcoholic Beverage Control, appeared for and represented the Department of Alcoholic Beverage Control. (Hereafter, the Department)

Donald A. Ramirez, attorney-at-law, appeared for licensee-respondent, Matthew Coit Entertainment, LLC. (Hereafter, Respondent)

After oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing, the matter was argued by the parties and submitted for decision on June 5, 2019.

As specified in the Department's accusation, it alleged cause for suspension or revocation of Respondent's license exists under California State Constitution, Article XX, section 22, and Business and Professions Code section 24200, subdivision (a) and (b), based on the following grounds:¹

Count 1: "On or about January 25, 2019, respondent-licensee's agents or employees, Javier Alexander Magallon, Jeanett Lea Divinagracia, and Ralph Nobleza, permitted Sophia Lynn Delli-Gatti, a person under the age of 21 years, to enter and remain in the licensed premises without lawful business therein, in violation of Business and Professions Code Section 25665." (Exhibit 1:Pre-hearing pleadings)

Count 2: "On or about January 25, 2019, respondent-licensee's agents or employees, Javier Alexander Magallon, Jeanett Lea Divinagracia, and Ralph Nobleza, permitted Jaqueline Savannah Fletcher, a person under the age of 21 years, to enter and remain in the licensed premises without lawful business therein, in violation of Business and Professions Code Section 25665."

Count 3: "On or about January 25, 2019, respondent-licensee's agents or employees, Javier Alexander Magallon, Jeanett Lea Divinagracia, and Ralph Nobleza, permitted Samantha Jo Tringali, a person under the age of 21 years, to enter and remain in the licensed premises without lawful business therein, in violation of Business and Professions Code Section 25665."

FINDINGS OF FACT

1. The Department filed its accusation on February 28, 2019. On March 14, 2019, the Department received Respondent's Notice of Defense requesting a hearing on the accusation.
2. On April 11, 2017, the Department issued Respondent a type-48 on-sale general public premises license for its premises known as McGovern's Irish Pub at 215 E. 4th Avenue, San Mateo, California. (Hereafter the Licensed Premises) Respondent's type-48 license permitted it to retail in beer, wine, and distilled spirits for consumption on the licensed premises. With few exceptions, no minors are allowed on the licensed premises.
3. No evidence established Respondent suffered any prior disciplinary action at the Licensed Premises.

¹ All further section references are to the California Business and Professions Code unless noted otherwise.

4. On January 25, 2019, at approximately 9:53 p.m., Alcoholic Beverage Control Agents Louie, Ott, and Cook went to the Licensed Premises in an undercover capacity.² The Licensed Premises was open and operating. There were approximately 20-40 patrons already present. The Licensed Premises had a bar counter, approximately six booths for seating, some video games, and a pool table.

5. When the agents entered the Licensed Premises, there was no doorman at the entrance they used. Once inside, they walked around and looked for any obviously intoxicated patrons or persons under 21 years old.

6. Approximately 7-10 minutes after their entry into the Licensed Premises, the agents focused on two groups of youthful appearing people who occupied two adjacent booths. Agents Ott and Cook checked one group at one booth for their ages, while Agent Louie contacted the second group sitting in the adjacent booth. That booth consisted of four youthful appearing women identified as Jaqueline Savannah Fletcher (Hereafter Fletcher), Samantha Jo Tringali (Hereafter Tringali), Jaqueline Michelle Delli-Gatti (Hereafter Jaqueline Delli-Gatti), and her sister, Sophia Lynn Delli-Gatti (Sophia Delli-Gatti). Agent Louie identified himself to them as an ABC Agent and indicated he wanted to check their identifications.

7. Agent Louie inspected the identification presented by Jaqueline Delli-Gatti. He determined she was at least 21 years old.

8. Agent Louie inspected the identification presented by Sophia Delli-Gatti. Her identification appeared authentic to Agent Louie and he returned it to her. It indicated she was at least 21 years old.

9. Agent Louie inspected the identification presented by Samantha Jo Tringali. Agent Louie questioned Tringali about her identification because it contained a photo of her but with a different hair color. Agent Louie concluded the identification acceptable and it indicated she was at least 21 years old. He returned it to Tringali. Prior to stopping at the minors' table, Agent Louie saw Tringali sip from a glass of beer that was on the table.³

² The agents' report of the incident indicated their time of arrival was 9:54 p.m.

³ No evidence was presented to establish exactly how Tringali's beer ended up at the table.

10. Agent Louie inspected the identification presented by Jaqueline Savannah Fletcher. Her identification appeared suspicious. Its printing was not clear and its finish too shiny. Agent Louie told Fletcher lying to the police was worse than having a false identification. Fletcher admitted she gave Agent Louie a false identification and that she was only 19 years old. She had no authentic identification with her then. Agent Louie's check with the California Highway Patrol (Hereafter CHP) indicated Fletcher's birthdate was May 12, 1999. Fletcher told Agent Louie that the four of them came into the premises at approximately 9:30 p.m. and there was no doorman, so they did not show their identification to anyone that night.

11. Agent Louie was joined by Agent Ott who re-inspected Sophia Delli-Gotti's identification. Agent Ott believed it was not authentic. Ultimately, Sophia Delli-Gotti admitted to the agents that she gave them a false identification and gave Agent Ott a valid California Driver License that indicated Delli-Gotti's date of birth was February 21, 1999 and was therefore only 19 years old.

12. The agents issued a citation to Sophia Delli-Gotti for being a minor being in a public premises and for possession of a false identification. The citation indicated the time of violation was 10:57 p.m.

13. The agents issued a citation to Jaqueline Fletcher for being a minor on a public premises and for possession of a false identification.

14. A few days later, Agent Louie checked with the CHP regarding the identification Samantha Jo Tringali presented to him on January 25, 2019. He had taken a photo of Tringali's identification before he returned it to her that night. The CHP indicated they had no record of the identification Tringali showed Agent Louie, but they did have a record of a valid driver license issued to Tringali that indicated she was born on November 9, 1999. That made her only 19 years old as of January 25, 2019. Agent Louie did not thereafter issue Tringali a citation for any violation.

15. The booth where the four women were found was approximately 15-20 feet from the Licensed Premises bar counter.

16. On the night of the investigation, Agent Louie was contacted by the Licensed Premises doorman, Ralph Nobleza. (Hereafter Nobleza) Nobleza identified himself as the doorman and indicated he began checking patrons' identifications when his shift began at 10:00 p.m. He had not checked the identifications of the four women Agent Louie questioned because they were there before Nobleza arrived to begin his 10:00 p.m. shift.

17. A few days later, on February 5, 2019, Agent Louie spoke by phone with Respondent's bartender, Javier Magallon. (Hereafter Magallon) Magallon told Agent Louie he recalled the four women at the table, and that one of them had a beer. He denied he served them any beer. He said that he asked the other bartender, "Jeanett", if she had checked their identifications and she said she had not.

18. On February 6, 2019, Agent Louie spoke by phone with bartender Jeannett Lea Diviniagracia (Hereafter Diviniagracia) who told Agent Louie that she had not checked the women's identification and that bartender Magallon told her that he had not checked their identifications either. Diviniagracia indicated that none of the four women came up to the bar counter. She added she and Magallon did not know how the glass of beer ended up at the minors' table.

19. Minors Jaqueline Fletcher, Sophia Delli-Gatti, and Samantha Tringali were all called by the Department as witnesses at the hearing.⁴ The Department indicated that one or more minors might seek to not to testify at the hearing to avoid incriminating themselves. The ALJ had each minor take the stand and be sworn in. The ALJ made some preliminary inquiries regarding who their counsel was, when they last conferred with their counsel, and what they were directed to do. At the direction of their respective counsel, each of them claimed the privilege not to testify at the hearing to avoid self-incrimination. The ALJ concluded each claim of privilege was timely, had merit, and was appropriate under Government Code section 11513, subdivision (e).⁵ None of the three minors testified as to the facts and circumstances concerning their presence and activities at the Licensed Premises and were excused from the hearing. They were advised they might be called to testify at a later date.

⁴ Under section 25666, when a violation of section 25665 has been charged, the Department is generally required to present the involved minor at the hearing for examination.

⁵ Government Code section 11513, subdivision (e), states: "The rules of privilege shall be effective to the extent they are otherwise required by statute to be recognized at the hearing." Evidence Code section 940 states: "To the extent that such privilege exist under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him." Sophia Delli-Gatti and Jaqueline Fletcher indicated they had not yet resolved their criminal citations. Samantha Tringali, although not cited by the agents, was still in criminal jeopardy as the criminal one-year statute of limitations under Penal Code section 802, subdivision (a), had not run as to possessing a false identification in violation of section 25661, a misdemeanor, and being a minor on a public premises in violation of section 25665, also a misdemeanor.

20. Matthew Coit, owner of the Respondent corporation, has been the licensee at the Licensed Premises for approximately two years.⁶ He was also licensed at a second type-48 on-sale general public-premises also in San Mateo for approximately the past six years. He has not suffered any disciplinary action at either location. He has taken the Department's LEAD⁷ training class three times and also has a "guard-card".

21. Coit testified he directed his bartenders to check the identifications of those patrons who did not appear at least 40 years old. He hired bartenders he believed would be capable of dealing with patrons in checking their identifications as needed. His bartenders must attend the Department's LEAD class too. As of January 25, 2019, bartender Diviniagracia and door man Nobleza had already completed the LEAD class. Bartender Magallon had not yet taken the class but completed it sometime after January 25, 2019.

22. Coit testified that when no doorman was working, bartenders were directed to check the identifications of anyone who came to the counter for an alcoholic beverage. They only served one drink per identification checked. If someone ordered more than one drink, the bartenders were instructed to check the identifications of those who the additional drink(s) was for. If a pitcher of beer was ordered for a group, then the bartender was to insure all in the group were at least 21 years old. Respondent's employees also had access to small "black lights" with an attached magnifying glass to assist in examining identifications presented to them. If the patron checked was at least 21, their hand was stamped by the bartender or doorman.⁸

23. On weekend nights, doormen staffed the entrance beginning at 10:00 p.m. and would thereafter systematically work their way through the patrons inside the premises to verify all were at least 21 years old. The doorman would hand stamp all those patrons he determined were at least 21 years old. On January 25, 2019, Nobleza was the doorman assigned to work that night, beginning at 10:00 p.m. and work until 2:00 a.m., after which he also helped with cleaning up the Licensed Premises for the night.

24. Coit testified that the local police department told him at one time that 10-15 minutes should be a sufficient time-window during which he should be able to detect any underage person in the Licensed Premises.

⁶ Matthew Coit was Respondent's only witness.

⁷ It was assumed LEAD meant the Department's Licensee Education on Alcohol and Drug class.

⁸ There was no evidence that any of the minors' hands were stamped.

25. After the January 25, 2019 incident, Coit met separately with bartenders Magallon and Diviniagracia about what happened that night.⁹ Each informed him they conferred with each other that night about noticing the group of four women at the table and that there was a beer there. Magallon and Diviniagracia each denied to the other that they had served beer at that table and concurred that neither of them had yet checked the womens' identifications. However, they decided as doorman Nobleza was just about to begin his shift, they would let him do his job and check those patrons to ascertain their ages. It was at or near that point in time when they told Coit they noticed Agent Louie at the minors' table. Coit opined that the minors were only there a short time because if the minors were there any longer, his bartenders and/or doorman would have become aware of them and verified their age prior to when Agent Louie contacted them.

LEGAL BASIS OF DECISION

1. Article XX, section 22 of the California Constitution and Business and Professions section 24200, subdivision (a), provides that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.

2. Business and Professions Code section 24200, subdivision (b), provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.

3. Business and Professions Code Section 25660 provides that: "(a) Bona fide evidence of majority and identity of the person is any of the following:

"(1) A document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a valid motor vehicle operator's license, that contains the name, date of birth, description, and picture of the person.

"(2) A valid passport issued by the United States or by a foreign government.

"(3) A valid identification card issued to a member of the Armed Forces that includes a date of birth and a picture of the person.

"(b) Proof that the defendant-licensee, or his or her employee or agent, demanded, was shown, and acted in reliance upon bona fide evidence in any transaction, employment, use, or permission forbidden by Section 25658, 25663, or 25665 shall be a defense to any

⁹ Neither Magallon nor Diviniagracia nor Nobleza testified at the hearing.

criminal prosecution therefor or to any proceedings for the suspension or revocation of any license based thereon.”

4. Business and Professions Code section 25661 states: (a) Any person under the age of 21 years who presents or offers to any licensee, his or her agent or employee, any written, printed, or photostatic evidence of age and identity which is false, fraudulent or not actually his or her own for the purpose of ordering, purchasing, attempting to purchase or otherwise procuring or attempting to procure, the serving of any alcoholic beverage, or who has in his or her possession any false or fraudulent written, printed, or photostatic evidence of age and identity, is guilty of a misdemeanor and shall be punished by a fine of at least two hundred fifty dollars (\$250), no part of which shall be suspended; or the person shall be required to perform not less than 24 hours nor more than 32 hours of community service during hours when the person is not employed and is not attending school, or a combination of fine and community service as determined by the court. A second or subsequent violation of this section shall be punished by a fine of not more than five hundred dollars (\$500), or the person shall be required to perform not less than 36 hours or more than 48 hours of community service during hours when the person is not employed or is not attending school, or a combination of fine and community service, as the court deems just. It is the intent of the Legislature that the community service requirements prescribed in this section require service at an alcohol or drug treatment program or facility or at a county coroner’s office, if available, in the area where the violation occurred or where the person resides.

(b) The penalties imposed by this section do not preclude prosecution or the imposition of penalties under any other provision of law, including, but not limited to, Section 13202.5 of the Vehicle Code.

5. Business and Professions Code Section 25665 provides: “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. Any person under the age of 21 years who enters and remains in the licensed public premises without lawful business therein is guilty of a misdemeanor and shall be punished by a fine of not less than two hundred dollars (\$200), no part of which shall be suspended.”

6. Section 25666 states, “(a) In any hearing on an accusation charging a licensee with a violation of Sections 25658, 25663, and 25665, the department shall produce the alleged minor for examination at the hearing unless he or she is unavailable as a witness because he or she is dead or unable to attend the hearing because of a then-existing physical or mental illness or infirmity, or unless the licensee has waived, in writing, the appearance of the minor. When a minor is absent because of a then-existing physical or mental illness or infirmity, a reasonable continuance shall be granted to allow for the appearance of the minor

if the administrative law judge finds that it is reasonably likely that the minor can be produced within a reasonable amount of time.

“(b)(1) Nothing in this section shall prevent the department from taking testimony of the minor as provided in Section 11511 of the Government Code .

“(2) This section is not intended to preclude the continuance of a hearing because of the unavailability of a minor for any other reason pursuant to Section 11524 of the Government Code.

DETERMINATION OF ISSUES

1. As to Count 1, 2, and 3, cause for suspension or revocation of Respondent’s license does not exist under Article XX, section 22 of the California State Constitution and Business and Professions Code sections 24200(a) because it was not sufficiently established that on January 25, 2019, Respondent’s employees Javier Alexander Magallon, Jeanett Lea Diviniagracia, and Ralph Nobleza permitted Sophia Lynn Delli-Gatti, Jaqueline Savannah Fletcher, and Samantha Jo Tringali, each then being under 21 years of age, to enter and remain on the licensed premises without lawful business in violation of Business and Professions Code section 25665.

2. With respect to a violation of section 25665, in *CMPB Friends v. Alcoholic Beverage Control Appeals Board* (2002) 100 Cal. App.4th 1250, 1256, 122 Cal. Rtr.2d 914, a minor was on a public premises for about 10 minutes before a waitress checked her identification to determine if she was at least 21 years old. Relying on the initial 10 minutes the minor was on the licensed premises before her identification was checked, the Department determined a violation of 25665 occurred based on the licensee’s passivity with respect to its efforts in determining the age of the minor. Relying on *Ballesteros v. Alcoholic Bev.etc. Appeals Board* (1965) 234 Cal. App.2d 694, 44 Cal. Rptr. 633, the court concluded that the mere passage of 10 minutes was not the exclusive determinative factor in determining whether a violation occurred, but the focus should be on the particular facts of each case, and based thereon, did the licensee act so passively with regard to its duty to exclude minors that a violation is established.

3. Agent Louie testified that on the night of the investigation, Fletcher told him her group of four women entered the Licensed Premises at approximately 9:30 p.m., that there was no door man, and that no one checked their identifications upon their entry.¹⁰ No hearsay objection was made regarding Agent Louie’s testimony reciting Fletcher’s statement.

¹⁰ Also, minors are not allowed, with some narrow exceptions, to enter and remain on a public premises at all times, not just after 10:00 p.m.

4. Under Government Codes section 11513, subdivision (d): “Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration.” In this instance, Fletcher’s unobjected to hearsay statement regarding details of exactly when and how her group entered the Licensed Premises and critical to determining whether or not there might be a violation of section 25665 was not merely supplementing or explaining other evidence. Her hearsay statement was the only evidence submitted to establish when her group entered the Licensed Premises. None of the four women at the table Agent Louie checked testified about the time and circumstances of their entry into and activity on the Licensed Premises.¹¹ There was neither a video recording, nor other non-hearsay evidence, nor other sufficient reliable evidence presented to establish the actual time and circumstances of the women’s entrance to the Licensed Premises. It was not established the minors entered the Licensed Premises at or about 9:30 p.m.

5. Therefore, the actual time frame of interest remaining was from the time the agents noticed Fletcher, Tringali, and the Delli-Gatti sisters in the Licensed Premises or when Respondent’s employees noticed or should have noticed those same minors and the time when Agent Louie ultimately checked their identifications.

6. The hearsay statements from the bartenders indicated they noticed the group of minors at one of the booths, determined neither of them had checked them to ascertain their age, and decided to let doorman Nobleza check for their age as he was supposed to do for all patrons inside a few minutes henceforth when his shift began at 10:00 p.m. Nobleza’s hearsay statement indicated he had not checked the minors’ identifications as his 10:00 p.m. shift had not yet begun. Again, under Government Code section 11513, subdivision (d): “Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration.” In this instance, no hearsay objection was made to the bartenders’ hearsay statements or to Nobleza’s hearsay statement. However, their hearsay statements were not being offered to supplement or explain other evidence. They were being offered to prove the bartenders’ and doorman’s actions,

¹¹ When the ALJ ruled none of the three alleged minors, Tringali, Fletcher, and Sophia Delli-Gatti, the Department called as witnesses to be examined as required under section 25666 would be permitted to testify due to their self-incrimination claim, the ALJ indicated it would entertain a motion by the Department to continue the hearing, but no motion was made.

recollections, thoughts, observations, and intent.¹² Their hearsay statements were not sufficient proof of the contents of those statements.

7. Agent Louie testified the ABC agents arrived at the Licensed Premises at about 9:53 p.m. The agents walked around in the Licensed Premises looking for intoxicated persons and those patrons possibly under 21 years old. He testified that approximately 7-10 minutes after their entry, they noticed two booths of youthful appearing persons and questioned the occupants of both booths. The precise length of time between when the agents noticed the two booths of youthful appearing persons and when Agent Louie contacted the booth containing Fletcher, Tringali, and the Delli-Gatti sisters was not expressly established, however whatever delay occurred was very brief, a matter of a few minutes if not less.

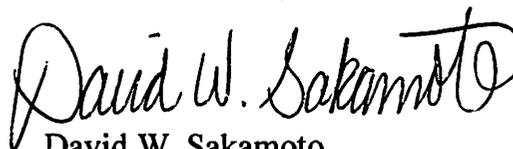
8. Thus, reliable evidence established only that the Delli-Gotti sisters, Tringali, and Fletcher were on the Licensed Premises only from when the agents first observed them seated at their booth until when Agent Louie checked their respective identifications. That time span lasted only a few minutes at most. It was neither sufficiently established what Respondent's employees were doing during that time nor was it sufficiently established they acted so passively with respect to the presence of Fletcher, Tringali, and Sophia Delli-Gatti to conclude they permitted those minors to enter and remain on the licensed premises in violation of section 25665.

9. The possession of false identifications by Tringali, Fletcher, and Sophia Delli-Gatti was irrelevant in this instance because it was not established any of Respondent's employees actually inspected and reasonably relied on them as proof of the minors' age.

ORDER

Counts 1, 2, and 3 of the accusation are dismissed.

Dated: September 10, 2019



David W. Sakamoto
Administrative Law Judge

¹² Had the bartenders and doorman Nobleza been called as witnesses, they could have provided testimony regarding their knowledge, their observations, and their intent with respect to this event.

