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

AB-9886
File: 47-459551; Reg: 19089153

GASS ENTERTAINMENT, LLC,
dba The Fox Theatre
1807 Telegraph Avenue
Oakland, CA 94612-2109,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: January 8, 2021
Telephonic

ISSUED JANUARY 13, 2021

Appearances: *Appellant:* Gillian Garrett, of Hinman & Carmichael LLP, as counsel for Gass Entertainment, LLC,

Respondent: Patrice G. Huber, as counsel for the Department of Alcoholic Beverage Control.

OPINION

Gass Entertainment, LLC, doing business as The Fox Theatre (appellant), appeals from a decision of the Department of Alcoholic Beverage Control (Department)[1] suspending its license for 10 days (with all ten days stayed for a period of one year, provided no further cause for discipline arises during that time), because its employee sold or furnished an alcoholic beverage to an individual under the age of 21, in violation

[1]The decision of the Department under Government Code § 11517(c), dated July 9, 2020, is set forth in the appendix, as is the proposed decision of the administrative law judge (ALJ), dated December 2, 2019, which was considered and rejected by the Department.

of Business and Professions Code section 25658, subdivision (a);[2] and permitted an individual under the age of 21 to consume an alcoholic beverage in the licensed premises, in violation of Business and Professions Code section 25658, subdivision (d).[3]

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general license was issued on February 3, 2009. There is no prior record of departmental discipline against appellant.

On August 22, 2019, the Department instituted a two-count accusation against appellant charging that on March 8, 2019, appellant's bartender, Jessica Johnson, sold or furnished an alcoholic beverage to 20-year-old Sara Doria (count 1); and knowingly permitted 15-year-old O.D.[4] to consume an alcoholic beverage in the licensed premises (count 2).

At the administrative hearing held on November 7, 2019, documentary evidence was received and testimony concerning the violation charged was presented by the two minors named in the accusation and Department Agent Michelle Ott. Appellant's

---

[2] Business and Professions Code section 25658(a) provides, in pertinent part:

> . . . every person who sells, furnishes, gives, or causes to be sold, furnished, or given away any alcoholic beverage to any person under 21 years of age is guilty of a misdemeanor.

[3] Business and Professions Code section 25658(d) provides:

> Any on-sale licensee who knowingly permits a person under the age of 21 years to consume any alcoholic beverage in the on-sale premises, whether or not the licensee has knowledge that the person is under the age of 21 years, is guilty of a misdemeanor.

[4] For privacy reasons we refer to the minor by her initials only.

bartender, Jessica Johnson (the bartender); Gregory Senzer, the owner of I.D. Procheck (the company providing ID-checking services at the licensed premises); and Doug Donahue, appellant's food and beverage director, testified on appellant's behalf.

Testimony established that on March 8, 2019, the two minors went to the licensed premises with their mother and 25-year-old sister to attend a concert. The venue hosted approximately 2100 guests on that evening. O.D. entered with her older sister and mother. Sara entered on her own.

Security staff checked identification at the door as patrons entered the premises, and placed a ¾" wristband on the right wrist of attendees who were over the age of 21. Sara presented her valid, but expired, California driver's license to the security staff. It had a vertical orientation and showed her correct date of birth, showing her to be 20 years of age, without removing it from the plastic window in her wallet (exh. 3). A security staff member placed a wristband on her right wrist (exh. 4) and she joined her the rest of her family members.

Sara went to the bar with her older sister and mother while O.D. waited at a table. O.D. had no wristband. Sara ordered a vodka-cranberry and a vodka-lemonade from an unidentified bartender. Her mother and older sister also ordered drinks. Sara did not recall who paid for the drinks but thought it might have been her mother. They returned to the table. Sara gave the vodka-cranberry to O.D. (exh. 2B) who consumed some of the drink. Sara kept the vodka-lemonade (exh. 5B). The group remained at the table until the performance began, then they moved to a railing inside the theater where they drank their drinks and watched the performance. No Department agents observed these activities.

After about 30 minutes, the older sister and mother left the railing area. O.D. remained there while Sara went to the bar and ordered another vodka-lemonade. The bartender asked to see her wristband but did not ask for identification. Sara was served the drink and returned to the railing with O.D. Department Agents Ott and Louie observed these activities.

The agents contacted and detained the minors. Sara (exh. 5A) initially said she was 21, but later admitted she was 20 years old. O.D. (exh. 2A) initially said she was 16, but later admitted that she was 15. Sara reluctantly pointed out her mother and older sister and they were contacted by the agents. Sara was cited for possession of an alcoholic beverage and consumption thereof and released. O.D. was cited for possession of an alcoholic beverage and released to her mother's custody.

The bartender testified that there were no "red flags" to indicate that Sara was not at least 21 and that Sara initially tried to order two drinks. She told Sara that she could only order one, then served her one vodka mixed drink. The bartender was subsequently issued a citation for serving alcohol to a minor and released.

The ALJ issued a proposed decision on December 2, 2019, sustaining count 1, dismissing count 2 (on the grounds that the Department failed to establish that appellant "knowingly permitted" O.D. to consume alcohol), and recommending a 10-day suspension, conditionally stayed for one year.

On December 10, 2019, the Department notified the parties it had not adopted the proposed decision and invited comments to be submitted to the Director. Both parties submitted comments. On January 10, 2020, the Department issued a Notice Concerning Proposed Decision, advising the parties that it had considered and rejected

the proposed decision. The parties were asked to submit briefs addressing the following questions:

> What duty does a licensee have to identify minors who are notoriously holding alcohol on the licensed premises?
>
> What mitigating or aggravating factors should affect the penalty imposed in this case?
>
> What penalty is appropriate for the violations found by the ALJ in the Proposed Decision?

(Notice Pursuant to Government Code Section 11517(c)(2)(E)(I).)

Both parties submitted briefs. Thereafter, on July 9, 2020, the Department issued its Decision Under Government Code Section 11517(c), sustaining both counts of the accusation and imposing a 10-day suspension, with all ten days stayed for a period of one year provided no further cause for discipline arises during that time.

Appellant then filed a timely appeal raising the following issues: (1) the decision is not supported by substantial evidence because there is no credible evidence the bartender knew or should have known Sara was a minor, (2) appellant's lack of actual or constructive knowledge is a complete defense because it did not "knowingly permit" O.D. to consume alcohol, (3) the decision is barred by Business and Professions Code section 25660 because bartenders are entitled to reasonably rely upon door checks, wristbands or stamps supplied by ID-checking staff at entry points, and (4) the decision violates the Administrative Procedures Act (APA) by mandating the re-carding of patrons after they have obtained a wristband.

DISCUSSION

I

SUBSTANTIAL EVIDENCE

Appellant contends the decision is not supported by substantial evidence. It maintains that its lack of actual or constructive knowledge is a complete defense because there is no credible evidence the bartender knew or should have known Sara was a minor and it did not "knowingly permit" O.D. to consume alcohol. (AOB at pp. 12-14.)

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)*.)

Appellant contends there is no credible evidence the bartender knew or should have known Sara was a minor or that the mother provided alcohol[5] to O.D. On the night of the incident, Sara told Agent Ott that she did not show her ID to the ID-checkers to obtain the wristband, but at the administrative hearing she admitted to showing her true ID. (RT at p. 114.) No evidence was presented to explain how Sara obtained a wristband from the ID-checkers (when her ID showed her to be under 21), nor which individual provided her with the wristband. (AOB at p. 14.) Further, appellant contends no evidence was presented to establish that it or its employees knew the mother provided alcohol to O.D. Appellant maintains:

> The Decision is invalid because the Department did not show The Fox Theater or any of its employees had actual or constructive knowledge about Mrs. Doria providing alcohol to Ms. O. Doria. Similarly, the Decision is invalid because the Department did not show Ms. Johnson (or any other employee) knew or should have known Ms. S. Doria was underage.

(AOB at p. 12.)

---

[5] Appellant asserts that the mother provided the alcohol to O.D., however the decision found that Sara provided it to her.

While the ID-checker who issued the wristband to Sara was an independent contractor rather than an employee, the Board has rejected the "no liability for the actions of an independent contractor argument" many times. As we have said consistently, whether an individual is an employee or an independent contractor is of no consequence where the thrust of the rule being enforced is to protect public welfare and morals. (See *Clubary* (2011) AB-9098.)

Furthermore, both this Board and the courts have consistently found that a licensee may be held liable for the actions of his agents or employees.

> The owner of a liquor license has the responsibility to see to it that the license is not used in violation of law and as a matter of general law the knowledge and acts of the employee or agent are imputable to the licensee. [Citation.]

(*Harris v. Alcoholic Beverage Control Appeals Board* (1961) 197 Cal.App.2d 172, 180 [17 Cal.Rptr. 315].) The *Laube* court noted:

> A licensee has a general, affirmative duty to maintain a lawful establishment. Presumably this duty imposes upon the licensee the obligation to be diligent in anticipation of reasonably possible unlawful activity, and to instruct employees accordingly.

(*Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779].) It is well-settled in alcoholic beverage case law that an agent or employee's on-premises knowledge and misconduct is imputed to the licensee/employer. (See *Yu v. Alcoholic Bev. Control Appeals Bd.* (1992) 3 Cal.App.4th 286, 295 [4 Cal.Rptr.2d 280]; *Kirby v. Alcoholic Bev. Control Appeals Bd.* (1973) 33 Cal.App.3d 732, 737 [109 Cal.Rptr. 291].)

In short, the ID-checker who issued the wristband to Sara knew or should have known that she was not yet 21 when they looked at her California driver's license showing her to be 20 years of age. That knowledge is imputed to appellant.

Accordingly, in regards to count 1, substantial evidence supports a finding that appellant had constructive knowledge that Sara was not yet 21.

II

KNOWLEDGE

In regards to count 2, appellant contends it did not "knowingly permit" O.D. to consume alcohol, and that neither it nor its employees knew or should have known the mother provided alcohol to O.D. (AOB at p. 12.) The Department found as follows on count 2:

> 8. Licensees have an affirmative duty to ensure minors are not consuming alcoholic beverages on their licensed premises, and the condition for marked alcoholic cups was put in place to provide licensee's employees with a visual marker to determine when this conduct was occurring. Evidence shows that employees of the licensed premises are trained and responsible to watch for minors without a wristband drinking from cups only used for alcoholic beverages under the licensee's policy in place when the violation occurred.
>
> 9. The evidence shows that Respondent's employees or agents had constructive knowledge O.D. was in possession of and consuming an alcoholic beverage on the licensed premises and was also a minor. Sara provided O.D. her alcoholic beverage. O.D. was not at the service-counter with Sara when she obtained those first two drinks from an unknown bartender. These facts alone do not provide evidence of the licensee's employees' constructive knowledge. However, **the extensive time period between when O.D. received her alcoholic drink during which she was openly and notoriously drinking from a clear cup (indicating that it was an alcoholic beverage) without a wristband means that a "roamer" hired by the licensee should have been readily able to spot O.D. and confiscate the alcoholic beverage from her possession**. In this instance, the mere fact O.D. was consuming an alcoholic beverage on the licensed premises was not itself sufficient to meet the "knowingly permitted" requirement contained in section 25658, subdivision (d), to establish a violation of that subdivision. However, the conditions on the license specifically requiring steps to curb this behavior by minor patrons, the policies in place as testified to by the Respondent's witnesses, coupled with the extended time period O.D. was openly and without any attempt to hide consuming the alcoholic beverage establish that Respondent's employees had adequate time to comply with their statutory

duty to spot and remove the alcoholic drink from O.D. during the time she was drinking. Therefore, there was sufficient evidence to sustain Count 2 of the accusation.

(Determination of Issues, ¶¶ 8-9, emphasis added.)

By contrast, in the proposed decision (which was rejected by the Department), the ALJ agreed with appellant that count 2 should not be sustained:

3. As to count 2, 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 section 24200, subdivision (a)-(b), because it was not sufficiently proven that on March 8, 2019, Respondent's agents or employees knowingly permitted O.D., a person under the age of 21, to consume an alcoholic beverage on the licensed premises in violation of Business and Professions Code section 25658, subdivision (d).

4. The Department, as amended at the hearing, pled Count 2 as: "On or about March 8, 2019, respondent licensee agents or employees caused or permitted O.D., a person who was then under 21 years of age, to consume an alcoholic beverage upon the above captioned on-sale premises, in violation of Business and Professions Code Section(s) 25658(d)."

5. Section 25658, subdivision (d), states "Any on-sale licensee who *knowingly* permits a person under 21 years of age to consume any alcoholic beverage in the on-sale premises, whether or not the licensee has knowledge that the person is under 21 years of age, is guilty of a misdemeanor." (emphasis added) Therefore, in this case, it must be proven Respondent or his employees or agents "... knowingly ... " permitted O.D., a person under 21 years of age, to consume an alcoholic beverage on the licensed premises.

6. While neither a statute nor a case makes the Alcoholic Beverage Control Appeals Board's opinions binding precedential authority on Department decisions, in *Ovations Fanfare* AB-8551 (2007) it addressed the issue of what constitutes a violation of section 25658, subdivision (d), especially as to that sub-division's knowledge requirement. In that case, minors were found consuming beer on the licensed premises of the Alameda County Fair Grounds during a county fair. The ABC Appeals Board's opinion included an extensive analysis in terms of construing the effect of the knowledge requirement as set forth in section 25658, subdivision (d). It concluded that "... the legislature intended 'knowingly permit' in section 25658(d) to mean something different from the unmodified 'permit' found in section 24200. Therefore, establishing that

appellant permitted a violation did not carry the Department's burden to show that appellant knowingly permitted a violation, and the Department's decision must be reversed."

7. In this matter, once Sara and her family, including O.D., rejoined as a group in the licensed premises, Sara, her older sister, and their mother went to a bar-counter where they obtained alcoholic beverages from an unidentified bartender. O.D. remained at a table and did not go near that service counter. Sara obtained two alcoholic beverages and returned back to where O.D. was and gave her one of the two alcoholic drinks. O.D. did consume some of her drink. The group then went to stand at a railing closer to the performance stage and approximately 15-18 feet from service bar. O.D. consumed her drink while at the railing for approximately 30 minutes. Sometime later, Sara obtained her second drink from bartender Jessica Johnson and returned to rejoin O.D. It was very soon thereafter that Sara and O.D. were detained by the ABC Agents.

8. The evidence did not sufficiently establish any of Respondent's employees or agents had any knowledge or should have had knowledge O.D. was in possession of and consuming an alcoholic beverage on the licensed premises. Sara provided O.D. her alcoholic beverage. O.D. was not at the service-counter with Sara when she obtained those first two drinks from an unknown bartender. While O.D. was certainly youthful appearing, she did not otherwise conduct herself in any manner that should have attracted the attention of Respondent or his employees or agents, e.g., she was neither boisterous nor displayed unruly conduct. **It was not established any of Respondent's employees or staff came within some close proximity of or had some direct contact with O.D. so as to conclude they had knowledge or should have had knowledge O.D. was consuming an alcoholic beverage in the licensed premises**. While security staffer William Douglas followed ABC Agents Ott and Louie as they viewed activity in the premises, it was not shown Douglas had or should have had knowledge O.D. was consuming an alcoholic beverage inside the licensed premises. In this instance, the mere fact O.D. was consuming an alcoholic beverage on the license premises was not itself sufficient to meet the knowledge requirement contained in section 25658, subdivision (d), to establish a violation of that subdivision. Based upon the above, Count 2 was not adequately proven.

(Proposed Decision, Determination of Issues, ¶¶ 3-8, emphasis added.)

We agree with this analysis, but hasten to note that, when a case is decided under Government Code section 11517(c)(2)(E), the Appeals Board reviews only the

Department's decision, *not* the ALJ's proposed (but rejected) decision. If the Department rejects the decision, it may refer the matter back to the ALJ to take additional evidence or it may decide the matter itself, making its own findings, determinations, and order as it did here. When the Department issues its own decision, the rejected proposed decision "serves no identifiable function in the administrative adjudication process or, for that matter, in connection with the judicial review thereof." (*Compton v. Bd. of Trustees* (1975) 49 Cal.App.3d 150, 158 [122 Cal.Rptr. 493].)

Therefore, the Board does not ask whether the Department's decision is a better decision than the ALJ's, but rather, whether the Department's inferences and conclusions, standing alone, are reasonable, and whether its findings are supported by substantial evidence. The existence of a proposed but rejected decision reaching a different conclusion does not function as a evidentiary presumption bolstering appellant's case.

Appellant is charged in count 2 with violating section 25658(d) which states:

> Any on-sale licensee who **knowingly permits** a person under the age of 21 years to consume any alcoholic beverage in the on-sale premises, whether or not the licensee has knowledge that the person is under the age of 21 years, is guilty of a misdemeanor.

(Bus. and Prof Code § 25658(d), emphasis added.)

When a minor is found drinking in a licensed premises, the Department has two options for bringing an accusation. The licensee may be charged with violating section 24200 by *permitting* the minor to violate section 25658(b), or, the Department may charge the licensee with a violation of section 25658(d) for *knowingly permitting* a minor to consume an alcoholic beverage in a licensed premises.

The accusation in this case charged appellant licensee with violating section 25658(d). Because the violation was charged under this section , the Department was required to prove that appellant ***knowingly*** permitted the violation, not simply that appellant permitted the violation. We agree with the analysis of the ALJ in the proposed decision and conclude that the Department failed to prove that appellant knowingly permitted the violation. In determining, as we must, whether the Department's inferences and conclusions, standing alone, are reasonable, and whether its findings are supported by substantial evidence, we find they are not. Accordingly, we find the Department erred in rejecting the ALJ's proposed decision.

The Department sustained count 2 on the basis that appellant had constructive knowledge that O.D. was a minor and that her consumption of alcohol should have been discovered because of

> . . . the conditions on the license specifically requiring steps to curb this behavior by minor patrons, the policies in place as testified to by the Respondent's witnesses, coupled with the extended time period O.D. was openly and without any attempt to hide consuming the alcoholic beverage establish that Respondent's employees had adequate time to comply with their statutory duty to spot and remove the alcoholic drink from O.D. during the time she was drinking.

(Determination of Issues, ¶ 9.)

In short, the Department concluded that appellant should have discovered that a minor was drinking alcohol—therefore it knowingly permitted this activity. We disagree. Simply because the Department believes the consumption of alcohol *should* have been discovered does not establish that appellant *knowingly permitted* that consumption.

In a similar case, the Board reversed the Department's decision because it failed to establish that appellant "knowingly" permitted the sale of narcotics:

> A number of cases have held that there is a distinction between statutes such as section 24200.5 that impose discipline for violations "knowingly" done and those such as section 24200, subdivision (b), that omit the word "knowingly." The former, it has been held, require knowledge of the violations, while the latter do not. (See, e.g., *Stoumen v. Munro* (1963) 219 Cal.App.2d 302, 311-312 [33 Cal.Rptr. 305]; *Benedetti v. Department of Alcoholic Beverage Control* (1960) 187 Cal.App.2d 213, 216 [9 Cal.Rptr. 525]; *Mercurio v. Department of Alcoholic Beverage Control* (1956) 144 Cal.App.2d 626, 629-631 [301 P.2d 474].) Assuming this is true[fn.], the decision does not provide a basis upon which to impose discipline, because it does not find that appellant violated the statute he was charged with violating. (See *Wheeler v. State Bd. of Forestry* (1983) 144 Cal.App.3d 522, 526-527 [192 Cal.Rptr. 693].)

(*Nuon* (2004) AB-8159 at pp. 4-5.) As we said in *Ovations Fanfare* (the case cited by the ALJ in Determination of Issues paragraph 6 of the proposed decision):

> The distinction made by the courts is based on the supposition that the legislature did not just randomly include "knowingly" in some disciplinary provisions, but not in others. The following examples are typical of the language used by the courts:
>
> > The very fact that rules and laws providing for violations for which disciplinary action may be taken, provide that some violations must be "knowingly" done and as to others the word "knowingly" is omitted, indicates that in the latter cases there is no requirement that the violations be knowing ones.
>
> (*Mercurio v. Dept. of Alcoholic Beverage Control* (1956) 144 Cal.App.2d 626, 630-631 [301 P.2d 474].)
>
> > It seems clear from the statutes with respect to the suspension and revocation of licenses that the Legislature has differentiated between knowingly permitting an act and merely permitting it; and that when it intends that the act must be knowingly permitted, it has said so. . . . [¶] The fact that no words expressing that idea are in the statute, when one word (knowingly) would have sufficed for that purpose, is a strong indication of the legislative intent that the offense should be complete without it.
>
> (*Brodsky v. California State Board of Pharmacy* (1959) 173 Cal.App.2d 680, 691 [344 P.2d 68].)

(*Ovations Fanfare* (2007) AB-8551 at p. 10.)

The Department's position in this case, makes the terms “permit” and “knowingly permit” equivalent, a position we find untenable under the circumstances. In construing statutes, the Appeals Board, like a court, is not entitled to simply disregard troublesome words in a statute, but must attempt to give significance to every word and phrase in pursuance of the legislative purpose; construing some of the words as surplusage is to be avoided. (*Gonzales & Co. v. Dept. of Alcoholic Bev. Control* (1984) 151 Cal.App.3d 172, 178 [198 Cal.Rptr. 479].) Where a word is used with a modifier in one provision of a statutory scheme, omitting the modifier when the word is used in a similar provision of that scheme is significant, indicating a different legislative intent for each provision. (*Ibid*.)

We conclude that the Legislature intended “knowingly permit” in section 25658(d) to mean something different from the unmodified “permit” found in section 24200. Therefore, establishing that appellant permitted a violation did not carry the Department's burden to show that appellant knowingly permitted a violation, and the Department's decision must be reversed as to count 2.

III

SECTION 25660

Appellant contends the decision as to count 1 is barred by Business and Professions Code section 25660 because bartenders are entitled to reasonably rely upon door checks, wristbands or stamps supplied by ID-checking staff at entry points. (AOB at pp. 15-16.) It maintains section 25660 provides a complete defense to count 1 by allowing a licensee to rely on what appears to be bona fide evidence of majority and identity if the reliance is reasonable. Most cases involving section 25660 involve a fake

ID, but in this case appellant maintains the bartender reasonably relied Sara's wristband as evidence of majority.

In the instant case, there is no evidence that a fake ID was shown on the evening in question. Sara initially said she didn't show any ID to the ID-checker when questioned by Agent Ott on the night of the incident, but later testified at the administrative hearing that she showed her actual ID, showing her to be 20 years of age. Nevertheless, she was issued a wristband, indicating she was at least 21. Appellant maintains the Department failed to produce credible evidence to establish how Sara obtained her wristband. (AOB at p. 14.)

In the decision, the following findings were made on the section 25660 issue:

> 2. The evidence established 20-year old Sara Doria had her identification checked by Respondent's vendor-identification-checkers at the licensed premises entrance. She was issued a wristband and entered the licensed premises. She was thereafter sold, served, or furnished an alcoholic beverage by Respondent's bartender, Jessica Johnson. The licensee cannot claim the wristband worn by Sara during this transaction constituted a bona fide identification since the licensee's agent gave it to Sara improperly. There was no evidence Sara possessed or used a false or counterfeit identification to facilitate obtaining a wristband upon her entry to the licensed premises or in obtaining her alcoholic beverage from bartender Johnson. These facts bar the Respondent from effectively invoking the affirmative defense found in Business and Professions code section 25660. Therefore, there was sufficient evidence to sustain Count 1 of the accusation.

(Determination of Issues, ¶ 2.)

In *Lacabanne*, cited by appellant, two minors entered the licensed premises by each showing a fake ID to the doorman. Later, the bartender (relying on the fact that ID had been checked at the door), did not ask for ID again. The court found that it was reasonable for the bartender to have relied on the previous checking of ID, saying:

> The licensee demonstrated some degree of knowledge, competency, honesty and integrity by having a door check on his patrons. This check

> was operating, and was held effective as a defense to the otherwise admitted offense of permitting a minor to enter. It should not be lost as a defense to a transaction of which that entry is but a part, unless there is an absolute duty for repeated demands to show evidence of majority and identity. . . . If there is no duty to make a second demand before serving the minor, the fact that the second employee made an inadequate inquiry should not defeat the right of the licensee to rely on the original determination that the patron had shown the evidence required by law.

(*Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control* (1968) 261 Cal.App.2d 181, 191 [67 Cal.Rptr. 734].)

Section 25660 is an affirmative defense and the burden is therefore upon the licensee to show that it is entitled to the benefits of such a defense. [Citations.] (*Farah v. Alcoholic Beverage Control Appeals Board* (1959) 159 Cal.App.2d 335, 338-339 [324 P.2d 98].)

In *Lacabanne*, the court found there was no duty for the bartender to ask a second time for identification, finding that it was reasonable for the bartender to have relied on the fact that ID had been checked at the door. This was only true in that case, however, because the ID that was relied upon was a good fake—one that met the requirements of section 25660 for reasonable reliance.

In the instant matter, there is no evidence that Sara showed the ID-checker a fake ID. Indeed, she testified that she showed her true ID, showing her to be 20 years old. Appellant, on the other hand, maintains:

> The fact that the Department did not present adequate evidence about how Ms. S. Doria obtained her wristband (or what evidence of age she actually provided) should not strip The Fox Theater of its Section 25660 protections. Section 25660 should provide a complete defense to Count One because Ms. Johnson properly inspected and relied upon Ms. S. Doria's wristband before serving her.

(AOB at p. 16.)

While the evidence presented at the administrative hearing to establish how Sara came to acquire a wristband is not extensive, it nevertheless exists. Sara's own testimony was accepted as evidence by the Department that she did indeed show her true ID to the ID-checkers at the door. The decision found:

> 9. At the entrance, Sara displayed to a security staffer her valid, but expired, California driver license The license was displayed behind a window in her rectangularly shaped wallet. (Exhibit 3: Photo of open wallet[fn.]) Her driver license was vertically oriented and had her true birthdate on it. An unidentified security staffer checked Sara's identification and placed a wristband on her right wrist. Sara never removed her driver license from her wallet.

(Finding of Fact, ¶ 9.) As we have noted many times, our standard of review is as follows:

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].) The Board is prohibited from reweighing the evidence or exercising its independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result (*Ibid.*) when, as here, appellant failed to satisfy its burden of proof to establish an affirmative defense.

IV

APA

Appellant contends the decision violates the APA by mandating the re-carding of patrons after they have obtained a wristband. Appellant maintains such a mandate constitutes an underground regulation, and must go through the formal rulemaking procedures outlined in the APA to be valid. (AOB at pp. 16-19.)

The APA defines the term "regulation" broadly: "'Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." (Gov. Code, § 11342.600.) "[I]f it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it." (*State Water Resources Control Bd. v. Office of Admin. Law* (1993) 12 Cal.App.4th 697, 702 [16 Cal.Rptr.2d 25].)

The APA requires that all regulations be adopted through the formal rulemaking process.

> No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation, as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

(Gov. Code, § 11340.5(a).)

All regulations are subject to the APA rulemaking process unless expressly exempted by statute. (Gov. Code, § 11346; *Engelmann v. State Bd. of Education* (1991) 2 Cal.App.4th 47, 59 [3 Cal.Rptr.2d 264].) Compliance with the rulemaking

process is mandatory; where a regulation was not properly adopted, it has no legal effect. (*Armistead v. State Personnel Bd.* (1978) 22 Cal.3d 198, 204-205 [149 Cal.Rptr. 1].)

In *Tidewater*, cited by both parties, the California Supreme Court outlined a two-part test to determine if something is a regulation subject to the rulemaking requirements of the APA:

> A regulation subject to the APA thus has two principal identifying characteristics. [Citation.] First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. [Citation.] Second, the rule must "implement, interpret, or make specific the law enforced or administered by [the agency], or . . . govern [the agency's] procedure." (Gov. Code, §11342, subd. (g).)

(*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571 [59 Cal.Rptr.2d 186].)

The analysis does not stop there, however. Even if the Board were to rule that mandating re-carding after obtaining a wristband is an underground regulation, this conclusion alone would not necessarily merit reversal. (See *id.*, at pp. 576-577.) As the Court observed,

> If, when we agreed with an agency's application of a controlling law, we nevertheless rejected that application simply because the agency failed to comply with the APA [rulemaking procedures], then we would undermine the legal force of the controlling law. Under such a rule, an agency could effectively repeal a controlling law simply by reiterating all its substantive provisions in improperly adopted regulations.

(*Id.*, at p. 577.) The court then went on to say that in order to prevail it is necessary to show that voiding the underground regulation would have changed the specific outcome of the case. (*Ibid*.)

Under the *Tidewater* test, it does not appear that the Department has instituted a standard of general application. Here, the evidence supports a finding that this was a case-specific decision to enforce section 25658, in order to prevent the sale of alcohol to minors. Where an agency's action does not create new laws or rules, APA rulemaking requirements do not apply. (*Morning Star Co. v. State Bd. Of Equalization* (2006) Cal.4th 214, 336; [42 Cal. Rptr. 3d 47].) There is no evidence to support the charge that the Department has instituted a blanket re-carding rule for all entertainment venues that issue wristbands.

Even if we did find that the mandated re-carding constituted an underground regulation, appellant has not demonstrated that voiding the complained-of procedure would have changed the outcome in this case. In order for this Board to grant relief, an appellant must show prejudice:

> No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

(Cal. Const., art. VI,§ 13.) "Under this standard, the appellant bears the burden to show it is reasonably probable he or she would have received a more favorable result at trial had the error not occurred." (*Citizens for Open Gov. v. City of Lodi* (2012) 205 Cal.App.4th 296, 308 [250 Cal.Rptr.3d 459]; see also *People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243].) Such a showing has not been made in this case. Even if the re-carding procedure were voided in this case, evidence still supports the finding that appellant violated section 25658, for the reasons outlined in section I of this opinion.

ORDER

For the reasons outlined above, the decision of the Department is affirmed as to count 1 and reversed as to count 2. The matter is remanded to the Department for further proceedings as may be necessary, and reconsideration of the penalty, in accordance with the views expressed herein.[6]

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

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

APPENDIX

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

IN THE MATTER OF THE ACCUSATION AGAINST: Gass Entertainment, LLC Dba: The Fox Theater 1807 Telegraph Ave. Oakland, CA 94612 Respondent Regarding Its Type-47 On-Sale General Eating-Place	**File No.: 47-459551** **Reg. No.: 19089153**

DECISION UNDER GOVERNMENT CODE SECTION 11517(c)

The above-entitled matter having regularly come before the Department on July 9, 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 November 7, 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, and Patrice Huber, Attorney, Office of Legal Services, Department of Alcoholic Beverage Control, represented the Department of Alcoholic Beverage Control. (Hereafter,"the Department")

Gillian Garrett, attorney-at-law, of Hinman and Carmichael, represented respondent-licensee, Gass Entertainment, LLC. (Hereafter, "Respondent")

After evidence was received at the hearing, the matter was argued by the parties and submitted for decision on November 7, 2019. The Administrative Law Judge issued a proposed decision dated December 2, 2019, which was rejected by the Director by Notice dated January 10, 2020. Written arguments were submitted on or about April 3, 2020, by both the Department and Respondent.

As specified in the Department's accusation, it seeks to discipline Respondent's license on the grounds that: on or about March 8, 2019, Respondent, through its agent or employee, Jessica Johnson, sold, furnished, or gave away, or caused to be sold, furnished, or given away, an alcoholic beverage, to-wit, a distilled spirit, to Sara Doria, a person under the age of 21, in violation of California Business and Professions Code section 25658, subdivision (a).[1] (Exhibit 1: pre-hearing pleadings, Accusation-Count 1)

As amended by the Department prior to submission of the case, it also alleged that on or about March 9, 2019, respondent-licensee's agents or employees caused or permitted O.D., a person under the age of 21 years, to consume an alcoholic beverage upon the above captioned on-sale premises, in violation of Business and Professions Code section 25658, subdivision (d). (Exhibit 1: pre-hearing pleadings, Accusation-Count 2)

FINDINGS OF FACT

1. The Department filed the accusation on August 22, 2019. On September 5, 2019, the Department received a Notice of Defense from Respondent requesting a hearing on the accusation. The matter was heard on November 7, 2019 and submitted for decision.

2. On February 3, 2009, the Department issued Respondent a type-47 on-sale general eating-place license for its premises known as the Fox Theater at 1807 Telegraph Avenue, Oakland, California. (Hereafter the licensed premises) A type-47 license permits the holder to retail in beer, wine, and distilled spirits for consumption on the licensed premises that must also operate as a bona-fide eating place as defined in section 23038. Minors are permitted to enter and remain on the licensed premises. The license was issued subject to certain conditions including that no more than two alcoholic beverages could be sold at one time to a patron and alcoholic beverages must be served in containers that were readily distinct from those used for non-alcoholic beverages.

3. Since being licensed, Respondent has not suffered any prior disciplinary action.

4. Sara Doria was born on September 26, 1998. On March 8, 2019, 20-year old Sara Doria (hereafter Sara), her 15-year old sister-O.D.,[2] her 25-year old sister, and their mother went together to the licensed premises to attend an evening concert.

5. O.D. was born on May 14, 2003, and was 15 years old on March 8, 2019, when she went to the licensed premises with her mother and two older sisters. She was approximately 5'9" tall, weighed approximately 123 pounds, and had shoulder length blonde hair. She was wearing a sweater and black leggings. She was in the 11th grade at her high school.

---

[1] All further statutory section references are to the California Business and Professions Code unless otherwise noted.
[2] As "O.D." was only 15 years old on the date of this incident, she will be referred herein by that designation to help preserve her privacy.

6. Respondent's licensed premises is a large live-performance venue in a restored historical theater with a capacity of approximately 2,800 patrons. On March 8, 2019, there were approximately 2,100 patrons attending an evening concert featuring Tori Kelly.

7. Upon their arrival at the license premises O.D., her 25-year old sister, and their mother entered the licensed premises.

8. Sara followed to make entry to the licensed premises on her own and apart from her family members. At the entrance of the licensed premises, security staff were checking the identifications of those who entered. For patrons who were 21 years or older, the security staffer would place an approximately ¾-inch-wide plasticized/paper band around their right wrist. The wrist band was placed on patrons to indicate to servers, bartenders, and staff inside the licensed premises that the patron was at least 21 years old.

9. At the entrance, Sara displayed to a security staffer her valid, but expired, California driver license The license was displayed behind a window in her rectangularly shaped wallet. (Exhibit 3: Photo of open wallet[3]) Her driver license was vertically oriented and had her true birthdate on it. An unidentified security staffer checked Sara's identification and placed a wristband on her right wrist. Sara never removed her driver license from her wallet.

10. After Sara entered the licensed premises, she joined her mother and two sisters. Sara, her older sister, and their mother then went to a service bar while O.D. remained at their table. O.D. had no wristband. At the bar counter, Sara ordered a vodka-lemonade and a vodka-cranberry drink from an unidentified bartender. Sara's mother and older sister also ordered drinks. Sara did not recall exactly who paid for those drinks but thought it might have been their mother. The bartender served Sara her two drinks. Sara returned to the table where O.D. had remained and gave O.D. the vodka-cranberry drink. O.D. consumed some of her drink. O.D.'s drink was in a clear plastic cup. Clear plastic cups were used for alcoholic beverages at the licensed premises as required by conditions on the license. Her cup's contents were red in color. The group of four remained at the table until the performance began. They all then proceeded further inside the theater and ended up near a railing where they stood, drank their drinks, and watched the performance.

[3] Exhibit 3, a photo of Sara's opened wallet displaying her identification in the front window was not taken the night of the investigation but taken within a few weeks prior to the hearing by Agent Ott to illustrate how the wallet appeared on March 8, 2019. The identification shown in Exhibit 3 was an identification issued to Sara after March 8, 2019, but the prior version of it in the wallet on March 8, 2019 appeared as the latter version in Exhibit 3 did.

11. O.D. held her drink at elbow level and there was no evidence she tried to conceal it. O.D. consumed her drink over a period of about 30 minutes. She was never confronted by any of Respondent's employees regarding her possession or consumption of the alcoholic beverage, even though she was not wearing the required wristband. She still possessed it when ultimately detained by ABC agents that night.

12. After about 30 minutes listening to the performer, Sara's 25-year old sister and their mother left the railing area while Sara and O.D. remained at the railing. While O.D. remained at the railing, Sara then approached a bar-service counter approximately 15-18 feet from the railing where she had been. At that counter, Sara ordered a vodka-lemonade from bartender Jessica Johnson. (Hereafter Johnson) Johnson asked Sara if she wanted "top-shelf" and Sara declined that. Johnson asked to see Sara's wristband and Sara displayed her wristband. Johnson then sold and served Sara her alcoholic drink and Sara left the bar-counter area and rejoined O.D. near the railing area. Johnson did not otherwise ask for, see, or inspect Sara's identification to verify her age.

13. Alcoholic Beverage Control Agents Ott and Louie were on-duty at the licensed premises on an enforcement assignment and were dressed in plain clothes. Upon gaining entrance to the licensed premises, they walked around looking for any activity requiring their attention. They were followed by Respondent's security staffer, William Douglas.

14. Agent Ott noticed Sara, her two sisters, and their mother inside the licensed premises near a railing. Agent Ott noticed each consume from their respective drink. Agent Ott suspected they might be a family group. Soon thereafter, the mother and one daughter left the area while Sara and O.D. remained at the railing. Agent Ott observed Sara approach one of the service counters tended by Johnson. Agent Ott observed Sara order a drink and pull her sleeve up. Bartender Johnson served Sara one drink, a vodka and soda/lemonade, in a clear plastic cup. Sara returned to the area near the railing where O.D. had remained.

15. Agent Ott and Louie contacted and detained both Sara and O.D. Sara initially told Agent Ott she was 21 but ultimately confessed she was only 20 years old. Agent Ott saw Sara possessed her recently expired, vertically formatted, valid California driver license that indicated her true birthdate. Agent Ott searched Sara's wallet and her person to determine if Sara possessed any false identification. Sara had none. Sara did possess a valid local city college identification that had information consistent with her driver license. Agent Ott verified with the California Highway Patrol via radio/phone the validity of Sara's expired driver license.

16. Agent Ott also contacted O.D. who initially indicated she was 16, but later conceded she was only 15 years old. O.D. still possessed her vodka and cranberry drink. O.D. indicated she did not obtain the drink she was holding from an employee of the licensed premises.

17. Sara reluctantly pointed out her mother and older sister in a lobby area of the licensed premises who the agents contacted. Sara was cited for possession of an alcoholic beverage and consumption thereof on the licensed premises and released at the scene. O.D. was cited for possession of an alcoholic beverage and, being a juvenile, was released at the scene to her mother.

18. The agents then contacted Johnson, the bartender they saw serve Sara her drink. The bartender appeared calm and indicated she specifically checked Sara's wristband to confirm she was at least 21 years old. To Agent Ott, it appeared Johnson knew Agent Ott was referring to Sara as the involved patron. Johnson neither asked to see Sara nor claimed ignorance of who Agent Ott was referring to as the involved underage minor.

19. Jessica Johnson testified she was 29 years old and worked as a bartender at the Fox Theater about four years. She had never been cited previously for serving an alcoholic beverage to a minor. She had taken the Department's LEAD class[4] and also a food handler's class. On March 8, 2019, from her bar station, she faced in the direction the main stage area. She recalled that night's crowd was on the younger side, but "mellow". That night, management directed only one alcoholic drink at a time be sold/served per wristband. She posted a written sign to that effect at her station.

20. Johnson testified Sara came to her service counter and asked for two drinks. Johnson asked to view Sara's wristband and told her she could only be served one drink. Johnson prepared, sold, and served Sara one vodka mixed-drink. To Johnson, Sara appeared confident, as though she could be 21 years old, and there were no "red-flags" to indicate she was not at least 21 years old. Johnson added sometimes she has asked to inspect the identification of a patron even if they showed her their wristband. She was later contacted by the ABC agents, issued a citation for serving an alcoholic beverage to a minor, and released at the scene. She indicated since that event, Respondent directed its bartenders to re-check the identification of any patron who orders an alcoholic beverage but does not appear at least 30 years old, even if they wore a wrist band. Johnson added alcoholic beverages are sold in clear plastic cups while non-alcoholic beverages are served in cups with a green colored band branded on the cup. Since this incident, she took the Department's LEAD course again.

21. Gregory Senzer (hereafter Senzer), owner of ID Pro-Check, testified he is the vendor who provided staff at the licensed premises to inspect the identifications of patrons entering the venue. On March 8, 2019, he and four of his employees were checking the identifications of those patrons who came to attend the concert. For those patrons who presented their identifications indicating they were at least 21 years old, his staff would wrap and affix a small plastic/paper wristband around the patron's right wrist. He

[4] It was assumed Johnson was referring to the Department's Licensee Education on Alcohol and Drugs educational course.

testified as most people are right-handed, this would also be the hand they would hold an alcoholic beverage. This helped the band be easier to see when Respondent's staff would view those possessing/holding alcoholic beverages inside the licensed premises. He indicated use of this type of wristband system is the most reliable manner to easily distinguish guests below 21 from those 21 and over once inside the premises. Senzer testified his staff members were instructed to hold and inspect each identification presented at the licensed premises entrance to see and feel for its authenticity. They were issued a flashlight to aid their visual inspections of it. They were instructed to look for the height, weight, hair color, birthdate, and photo on the identification. They had an identification guide book to refer to if needed. He believed his staff was trustworthy and did a thorough job of checking identifications. His staff takes the Department's LEAD class.

22. Doug Donahue (hereafter Donahue), Respondent's director of food and beverages, testified the licensed premises had a patron capacity of 2,800 guests. Based on ticket sales, he estimated approximately 2,100 guests attended the concert that night. There were approximately 8 bartenders staffing four serving stations inside the licensed premises.

23. Donahue testified Respondent used a system wherein wristbands are worn by persons who are at least 21 years-old. According to their license conditions, they can only serve up to two drinks per person who have a wristband. However, if the venue's program/performer is expected to draw a younger crowd, they have, on their own, reduced that to serving only one drink per wristband wearer. However, a wrist-banded patron could still buy one drink at one service counter and purchase a second at a different service counter. In addition to the wristbands, Donahue testified that the licensee employs "roamers" to walk around the premises to ensure those that are underage are not drinking alcohol. On March 8, 2019, he directed his staff that only one alcoholic beverage at a time be served per wrist-banded patron. He also indicated that alcoholic beverages were served in clear plastic cups and non-alcoholic beverages are served in cups with an identifiable band on them, this allows the hired "roamers" to identify minors without wristbands drinking from unmarked alcohol glasses.

24. That night, Jessica Johnson was one of his bartenders. He admonished her regarding this incident but otherwise considered her a reliable and trustworthy employee.

25. After this incident, he re-stressed to Respondent's staff to be careful who they serve alcoholic beverages to, to spot-check identifications if needed, and to not necessarily solely rely on the wristbands. He indicated Respondent takes seriously its responsibilities associated with exercising license privileges.

26. Tony Leong (hereafter Leong), Respondent's general manager, testified the Fox Theater has existed for many years and is a historical landmark. There are two interior

levels for patrons and a main performance stage. While the Fox Theater opened in 1928 as a large capacity traditional movie theater, it evolved over the years and has been restored to be a well-known live-entertainment/performance venue. It has a very ornate interior and received numerous award nominations and awards as a live-performance venue.

27. Leong added that in approximately August 2018, Respondent retained ID Pro-Check because their prior vendor seemed unreliable and they sought a higher quality company to handle the checking of patrons' identifications upon their entrance to the licensed premises.

28. On March 8, 2019, aside from the Pro-Check staff, Respondent had approximately 50 of its own staff at the premises. Some staff are servers, like bartenders, while others are posted at fixed positions in and around the licensed premises, and others roam the entire site to detect and address any disturbances, intoxicated patrons, or other problems. After this incident, the bartenders were informed they can request to see the identifications of youthful customers, even if they wore a wristband. He also added extra staff to roam the licensed premises and focus on detecting any under-age persons with alcoholic beverages. He also added approximately 25 surveillance cameras to the existing system, now totaling approximately 50 cameras mounted in and around the licensed premises. They have also focused some of those cameras at the entrance area where identifications are checked and wristbands issued.

LEGAL BASIS OF DECISION

1. Article XX, section 22 of the California Constitution and Business and Professions section 24200, subdivision (a), provide 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 Division 9, rules of the Department, and 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 25658, subdivision (a), provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.

4. Business and Professions Code section 25658, subdivision (d), provides that any on-sale licensee who knowingly permits a person under 21 years of age to consume any alcoholic beverage in the on-sale premises, whether or not the licensee has knowledge that the person is under 21 years of age, is guilty of a misdemeanor.

5. Business and Professions Code section 25660 provides for an affirmative defense for a licensee who reasonably relies upon specific bona fide evidence of being of age when selling or furnishing alcohol to a minor.

DETERMINATION OF ISSUES

1. As to count 1, cause for suspension or revocation of Respondent's license does exist under Article XX, section 22 of the California State Constitution and Business and Professions Code section 24200, subdivision (a)-(b), because on March 8, 2019, Respondent's employee, Jessica Johnson, inside the licensed premises, sold or furnished an alcoholic beverage to Sara Doria, a person under the age of 21, in violation of Business and Professions Code section 25658, subdivision (a).

2. The evidence established 20-year old Sara Doria had her identification checked by Respondent's vendor-identification-checkers at the licensed premises entrance. She was issued a wristband and entered the licensed premises. She was thereafter sold, served, or furnished an alcoholic beverage by Respondent's bartender, Jessica Johnson. The licensee cannot claim the wristband worn by Sara during this transaction constituted a bona fide identification since the licensee's agent gave it to Sara improperly. There was no evidence Sara possessed or used a false or counterfeit identification to facilitate obtaining a wristband upon her entry to the licensed premises or in obtaining her alcoholic beverage from bartender Johnson. These facts bar the Respondent from effectively invoking the affirmative defense found in Business and Professions code section 25660. Therefore, there was sufficient evidence to sustain Count 1 of the accusation.

3. As to count 2, cause for suspension or revocation of Respondent's license does exist under Article XX, section 22 of the California State Constitution and Business and Professions Code section 24200, subdivision (a)-(b), because on March 8, 2019, Respondent's agents or employees knowingly permitted O.D., a person under the age of 21, to consume an alcoholic beverage on the licensed premises in violation of Business and Professions Code section 25658, subdivision (d).

4. The Department, as amended at the hearing, pled Count 2 as: "On or about March 8, 2019, respondent licensee agents or employees caused or permitted O.D., a person who was then under 21 years of age, to consume an alcoholic beverage upon the above captioned on-sale premises, in violation of Business and Professions Code Section(s) 25658(d)."

5. Section 25658, subdivision (d), states "Any on-sale licensee who *knowingly* permits a person under 21 years of age to consume any alcoholic beverage in the on-sale premises, whether or not the licensee has knowledge that the person is under 21 years of age, is guilty of a misdemeanor." (emphasis added) Therefore, in this case, it must be proven Respondent

or his employees or agents "...knowingly..." permitted O.D., a person under 21 years of age, to consume an alcoholic beverage on the licensed premises.

6. In this matter, once Sara and her family, including O.D., rejoined as a group in the licensed premises, Sara, her older sister, and their mother went to a bar-counter where they obtained alcoholic beverages from an unidentified bartender. O.D. remained at a table and did not go near that service counter. Sara obtained two alcoholic beverages and returned back to where O.D. was and gave her one of the two alcoholic drinks. O.D. openly possessed and consumed her drink over a lengthy period of time until the agents confronted her.

7. The group then went to stand at a railing closer to the performance stage and approximately 15-18 feet from service bar. O.D. continued to openly possess and consume her alcoholic drink while at the railing for approximately 30 minutes. Sometime later, Sara obtained her second drink from bartender Jessica Johnson and returned to rejoin O.D. It was very soon thereafter that Sara and O.D. were detained by the ABC Agents.

8. Licensees have an affirmative duty to ensure minors are not consuming alcoholic beverages on their licensed premises, and the condition for marked alcoholic cups was put in place to provide licensee's employees with a visual marker to determine when this conduct was occurring. Evidence shows that employees of the licensed premises are trained and responsible to watch for minors without a wristband drinking from cups only used for alcoholic beverages under the licensee's policy in place when the violation occured.

9. The evidence shows that Respondent's employees or agents had constructive knowledge O.D. was in possession of and consuming an alcoholic beverage on the licensed premises and was also a minor. Sara provided O.D. her alcoholic beverage. O.D. was not at the service-counter with Sara when she obtained those first two drinks from an unknown bartender. These facts alone do not provide evidence of the licensee's employees' constructive knowledge. However, the extensive time period between when O.D. received her alcoholic drink during which she was openly and notoriously drinking from a clear cup (indicating that it was an alcoholic beverage) without a wristband means that a "roamer" hired by the licensee should have been readily able to spot O.D. and confiscate the alcoholic beverage from her possession. In this instance, the mere fact O.D. was consuming an alcoholic beverage on the licensed premises was not itself sufficient to meet the "knowingly permitted" requirement contained in section 25658, subdivision (d), to establish a violation of that subdivision. However, the conditions on the license specifically requiring steps to curb this behavior by minor patrons, the policies in place as testified to by the Respondent's witnesses, coupled with the extended time period O.D. was openly and without any attempt to hide consuming the alcoholic beverage establish that Respondent's employees had adequate time to comply with their statutory duty to spot and remove the alcoholic drink from O.D. during the time she was drinking. Therefore, there was sufficient evidence to sustain Count 2 of the accusation.

9. Except as set forth in this decision, all other allegations in the accusation and all other contentions the parties made in the pleadings or at the hearing regarding those allegations lack merit.

PENALTY

1. In assessing an appropriate measure of discipline, the Department's penalty guidelines are in California Code of Regulations, title 4, section 144. (Hereafter rule 144) Under rule 144, the penalty for a first violation for selling an alcoholic beverage to a minor is a 15-day license suspension.

2. Rule 144 also permits imposition of a revised penalty based on the presence of aggravating or mitigating factors. The duration of discipline free licensure and positive action taken by the licensee to correct the problem are specifically mentioned factors in mitigation.

3. The Department recommended a 20-day license suspension based on the extremely youthful age and appearance of O.D. and that she was permitted to consume her alcoholic beverage for some time and was never detected by Respondent's agents or employees. Further, Sara was permitted to enter the premises by showing her identification indicating she was only 20 years old and was issued a wrist band she later used to obtain her alcoholic beverage from bartender Johnson.

4. Respondent argued that count 1 and count 2 were essentially only one violation due to their being the same or similar conduct and Sara's mother bought the first round of drinks; Respondent's bartender-Johnson acted responsibly relying on Sara's wristband; Respondent's employees are thoroughly trained; Respondent had ample security staff; Respondent's bartenders now re-verify the age of those patrons ordering alcoholic beverages if they do not appear at least 30 years old; and the wristband-system is very reliable.

5. Although both count 1 and count 2 are sustained for separate violations of section 25658, subdivision (a) and subdivision (d), they do involve similar conduct within a single group at the licensed premises. Rule 144's standard penalty for a violation of these provisions is a 15-day suspension. The rule further acknowledges the length of prior discipline free licensure as a factor in mitigation. Respondent has been licensed since 2009 with no prior disciplinary action. This supports a mitigated penalty. Also, it appears that Respondent did have a systematic and deliberate program in place to prevent minors from obtaining alcoholic beverages at the licensed premises, even if that policy failed to be enforced by employees in their conduct toward O.D. Respondent does have a large security staff. As it is a bigger venue accessible to patrons both over and under 21, a large security staff would be expected. Respondent's management appears sincere in taking steps necessary to prevent minors having access to alcoholic beverages. Since this incident, Respondent has re-emphasized to its staff the critical nature of that objective. Respondent has also: installed

added surveillance cameras; directed its bartenders re-verify the age of those not appearing at least 30 years old who seek to obtain alcoholic beverages, even if they had a wristband; and hired additional roving security staff for its events to focus on detecting minors with alcoholic beverages. Based on these considerations, a downward departure from the 15-day suspension specified in Rule 144 is warranted as reflected in the order below.

6. Except as set forth herein, all other arguments raised by the parties with respect to the appropriate penalty did not have merit.

ORDER

1. Count 1 and count 2 of the accusation are sustained.

2. Respondent's license is suspended for a period of 10 days, with all 10 days of suspension 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 a similar 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 10 stayed-days of suspension, and should no such determination be made, the stay shall become permanent.

Sacramento, California

Dated: July 9, 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 ACCUSATION AGAINST:

GASS ENTERTAINMENT, LLC
THE FOX THEATER
1807 TELEGRAPH AVE
OAKLAND, CA 94612

ON-SALE GENERAL EATING PLACE - LICENSE

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

CONCORD DISTRICT OFFICE

File: 47-459551

Reg: 19089153

CERTIFICATE OF DECISION

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: January 21, 2020

Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

Gass Entertainment, LLC Dba: The Fox Theater 1807 Telegraph Ave. Oakland, CA 94612	}	File: 47-459551 Reg: 19089153
Respondent	}	License Type: 47 Word Count Estimate: 52,440
Regarding Its Type-47 On-Sale General Eating-Place License Under the State Constitution and the Alcoholic Beverage Control Act	}	Rptr: Joan Columbini, CSR (Emerick and Finch Reporters) **PROPOSED DECISION**

Administrative Law Judge David W. Sakamoto, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter in Oakland, California, on November 7, 2019.

Matthew Gaughan, Attorney, and Patrice Huber, Attorney, Office of Legal Services, Department of Alcoholic Beverage Control, represented the Department of Alcoholic Beverage Control. (Hereafter,"the Department")

Gillian Garrett, attorney-at-law, of Hinman and Carmichael, represented respondent-licensee, Gass Entertainment, LLC. (Hereafter, "Respondent")

The Department seeks to discipline Respondent's license on the grounds that: on or about March 8, 2019, Respondent, through its agent or employee, Jessica Johnson, sold, furnished, or gave away, or caused to be sold, furnished, or given away, an alcoholic beverage, to-wit, a distilled spirit, to Sara Doria, a person under the age of 21, in violation of California Business and Professions Code section 25658, subdivision (a).[1] (Exhibit 1: pre-hearing pleadings, Accusation-Count 1)

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

As amended by the Department prior to submission of the case, it also alleged that on or about March 9, 2019, respondent-licensee's agents or employees caused or permitted O.D., a person under the age of 21 years, to consume an alcoholic beverage upon the above captioned on-sale premises, in violation of Business and Professions Code section 25658, subdivision (d). (Exhibit 1: pre-hearing pleadings, Accusation-Count 2)

On November 7, 2019, 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.

FINDINGS OF FACT

1. The Department filed the accusation on August 22, 2019. On September 5, 2019, the Department received a Notice of Defense from Respondent requesting a hearing on the accusation. The matter was heard on November 7, 2019 and submitted for decision.

2. On February 3, 2009, the Department issued Respondent a type-47 on-sale general eating-place license for its premises known as the Fox Theater at 1807 Telegraph Avenue, Oakland, California. (Hereafter the licensed premises) A type-47 license permits the holder to retail in beer, wine, and distilled spirits for consumption on the licensed premises that must also operate as a bona-fide eating place as defined in section 23038. Minors are permitted to enter and remain on the licensed premises. The license was issued subject to certain conditions including that no more than two alcoholic beverages could be sold at one time to a patron and alcoholic beverages must be served in containers that were readily distinct from those used for non-alcoholic beverages.

3. Since being licensed, Respondent has not suffered any prior disciplinary action.

4. Sara Doria was born on September 26, 1998. On March 8, 2019, 20-year old Sara Doria (Hereafter Sara), her 15-year old sister-O.D.,[2] her 25-year old sister, and their mother went together to the licensed premises to attend an evening concert.

5. O.D. was born on May 14, 2003 and was 15 years old on March 8, 2019 when she went to the licensed premises with her mother and two older sisters. She was approximately 5'9" tall, weighed approximately 123 pounds, and had shoulder length blonde hair. She was wearing a sweater and black leggings. She was in the 11th grade at her high school.

---

[2] As "O.D." was only 15 years old on the date of this incident, she will be referred herein by that designation to help preserve her privacy.

6. Respondent's licensed premises was a large live-performance venue in a restored historical theater with a capacity of approximately 2,800 patrons. On March 8, 2019, there were approximately 2,100 patrons attending an evening concert featuring Tori Kelly.

7. Upon their arrival at the license premises O.D., her 25-year old sister, and their mother entered the licensed premises.

8. Sara followed to make entry to the licensed premises on her own and apart from her family members. At the entrance of the licensed premises, security staff were checking the identifications of those who entered. For patrons who were 21 years or older, the security staffer would place an approximately ¾" inch-wide plasticized/paper band around their right wrist. The wrist band was placed on patrons to indicate to servers/bartenders/staff inside the licensed premises that the patron was at least 21 years old.

9. At the entrance, Sara displayed to a security staffer her valid but expired California driver license that was displayed behind a window in her rectangularly shaped wallet. (Exhibit 3: Photo of open wallet[3]) Her driver license was vertically oriented and had her true birthdate on it. An unidentified security staffer checked Sara's identification and placed a wristband on her right wrist. Sara never removed her driver license from her wallet.

10. After Sara entered the licensed premises, she joined her mother and two sisters. Sara, her older sister, and their mother then went to a service bar while O.D. remained at their table. O.D. had no wristband. At the bar counter, Sara ordered a vodka-lemonade and a vodka-cranberry drink from an unidentified bar tender. Sara's mother and older sister also ordered drinks. Sara did not recall exactly who paid for those drinks but thought it might have been their mother. The bartender served Sara her two drinks. Sara returned to the table where O.D. had remained and gave O.D. the vodka-cranberry drink. O.D. consumed some of her drink. O.D.'s drink was in a clear plastic cup, as were used for alcoholic beverages at the licensed premises. Her cup's contents was red in color. The group of four remained at the table until the performance began. They all then proceeded further inside the theater and ended up near a railing where they stood, drank their drinks, and watched the performance.

---

[3] Exhibit 3, a photo of Sara's opened wallet displaying her identification in the front window was not taken the night of the investigation but taken within a few weeks prior to the hearing by Agent Ott to illustrate how the wallet appeared on March 8, 2019. The identification shown in Exhibit 3 was an identification issued to Sara after March 8, 2019, but the prior version of it in the wallet on March 8, 2019 appeared as the latter version in Exhibit 3 did.

11. O.D. held her drink at elbow level and there was no evidence she tried to conceal it. O.D. consumed her drink for about 30 minutes. There was no evidence O.D. otherwise conducted herself in any manner to become the focus of attention. She was never confronted by any of Respondent's employees regarding her possession or consumption of her alcoholic beverage. She still possessed it when ultimately detained by ABC agents that night.

12. After about 30 minutes listening to the performer, Sara's 25-year old sister and their mother left the railing area while Sara and O.D. remained at the railing. While O.D. remained at the railing, Sara approached a bar-service counter approximately 15-18 feet from the railing where she had been. At that counter, Sara ordered a vodka-lemonade from bartender Jessica Johnson. (Hereafter Johnson) Johnson asked Sara if she wanted "top-shelf" and Sara declined that. Johnson asked to see Sara's wristband and Sara displayed her wristband. Johnson then sold and served Sara her alcoholic drink and Sara left the bar-counter area and rejoined O.D. near the railing area. Johnson did not otherwise ask for, see, or inspect Sara's identification to verify her age.

13. Alcoholic Beverage Control Agents Ott and Louie were also on-duty at the licensed premises on an enforcement assignment and were in plain clothes. Once gaining entrance to the licensed premises, they walked around looking for any activity needing their attention while being followed by Respondent's security staffer, William Douglas.

14. Agent Ott noticed Sara, her two sisters, and their mother inside the licensed premises near a railing. Agent Ott noticed each consume from their respective drink. Agent Ott suspected they might be a family group. Soon thereafter, the mother and one daughter left the area while Sara and O.D. remained at the railing. Agent Ott observed Sara approach one of the service counters tended by Johnson. Agent Ott observed Sara order a drink and pull her sleeve up. Bartender Johnson served Sara one drink, a vodka and soda/lemonade, in a clear plastic cup. Sara returned to the area near the railing where O.D. had remained.

15. Agent Ott and Louie contacted and detained both Sara and O.D. Sara initially told Agent Ott she was 21 but ultimately confessed she was only 20 years old. Agent Ott saw Sara possessed her recently expired, vertically formatted, valid California driver license that indicated her true birthdate. Agent Ott searched Sara's wallet and her person to determine if Sara possessed any false identification. Sara had none. Sara did possess a valid local city college identification that had information consistent with her driver license. Agent Ott verified with the California Highway Patrol via radio/phone the validity of Sara's expired driver license.

16. Agent Ott also contacted O.D. who initially indicated she was 16, but later conceded she was only 15 years old. O.D. still possessed her vodka and cranberry drink. O.D. indicated she did not obtain the drink she was holding.

17. Sara reluctantly pointed out her mother and older sister in a lobby area of the licensed premises who the agents contacted. Sara was cited for possession of an alcoholic beverage and consumption thereof on the licensed premises and released at the scene. O.D. was cited for possession of an alcoholic beverage and, being a juvenile, was released at the scene to her mother.

18. The agents then contacted Johnson, the bartender they saw serve Sara her drink. The bartender appeared calm and indicated she specifically checked Sara's wristband to confirm she was at least 21 years old. To Agent Ott, it appeared Johnson knew Agent Ott was referring to Sara as the involved patron. Johnson neither asked to see Sara nor claimed ignorance of who Agent Ott was referring to as the involved underage minor.

19. Jessica Johnson testified she was 29 years old and worked as a bartender at the Fox Theater about four years. She had never been cited previously for serving an alcoholic beverage to a minor. She had taken the Department's LEAD class and also a food handler's class.[4] On March 8, 2019, from her bar station, she faced in the direction the main stage area. She recalled that night's crowd was on the younger side, but "mellow". That night, management directed only one alcoholic drink at a time be sold/served per wristband. She posted a written sign to that effect at her station.

20. Johnson testified Sara came to her service counter and asked for two drinks. Johnson asked to view Sara's wristband and told her she could only be served one drink. Johnson prepared, sold, and served Sara one vodka mixed-drink. To Johnson, Sara appeared confident, as though she could be 21 years old, and there were no "red-flags" to indicate she was not at least 21 years old. Johnson added sometimes she has asked to inspect the identification of a patron even if they showed her their wristband. She was later contacted by the ABC agents, issued a citation for serving an alcoholic beverage to a minor, and released at the scene. She indicated since that event, Respondent directed its bartenders to re-check the identification of any patron who orders an alcoholic beverage but does not appear at least 30 years old, even if they wore a wrist band. Johnson added alcoholic beverages are sold in clear plastic cups while non-alcoholic beverages are served in cups with a green colored band branded on the cup. Since this incident, she took the Department's LEAD course again.

---

[4] It was assumed Johnson was referring to the Department's Licensee Education on Alcohol and Drugs educational course.

21. Gregory Senzer (Hereafter Senzer), owner of ID Pro-Check, testified he is the vendor who provided staff at the licensed premises to inspect the identifications of patrons entering the venue. On March 8, 2019, he and four of his employees were checking the identifications of those patrons who came to attend the concert. For those patrons who presented their identifications indicating they were at least 21 years old, his staff would wrap and affix a small plastic/paper wristband around the patron's right wrist. He testified as most people are right-handed, this would also be the hand they would hold an alcoholic beverage. This helped the band be easier to see when Respondent's staff would view those possessing/holding alcoholic beverages inside the licensed premises. He indicated use of this type of wristband system is the most reliable manner to easily distinguish guests below 21 from those 21 and over once inside the premises. Senzer testified his staff members were instructed to hold and inspect each identification presented at the licensed premises entrance to see and feel for its authenticity. They were issued a flashlight to aid their visual inspections of it. They were instructed to look for the height, weight, hair color, birthdate, and photo on the identification. They had an identification guide book to refer to if needed. He believed his staff was trustworthy and did a thorough job of checking identifications. His staff takes the Department's LEAD class.

22. Doug Donahue (Hereafter Donahue), Respondent's director of food and beverages, testified the licensed premises had a patron capacity of 2,800 guests. Based on ticket sales, he estimated approximately 2,100 guests attended the concert that night. There were approximately 8 bartenders staffing four serving stations inside the licensed premises.

23. Donahue testified Respondent used a wristband system wherein those are worn by persons who are at least 21years old. According to their license conditions, they can only serve up to two drinks per person who have a wristband. However, if the venue's program/performer is expected to draw a younger crowd, they have, on their own, reduced that to serving only one drink per wristband wearer. However, a wrist-banded patron could still buy one drink at one service counter and purchase a second at a different service counter. On March 8, 2019, he directed his staff that only one alcoholic beverage at a time be served per wrist-banded patron. He also indicated that alcoholic beverages were served in clear plastic cups and non-alcoholic beverages are served in cups with an identifiable band on them.

24. That night, Jessica Johnson was one of his bartenders. He admonished her regarding this incident but otherwise considered her a reliable and trustworthy employee.

25. After this incident, he re-stressed to Respondent's staff to be careful who they serve alcoholic beverages to, to spot-check identifications if needed, and to not necessarily solely rely on the wristbands. He indicated Respondent takes seriously its responsibilities associated with exercising license privileges.

26. Tony Leong (Hereafter Leong), Respondent's general manager, testified the Fox Theater has existed for many years and is a historical landmark. There are two interior levels for patrons and a main performance stage. While the Fox Theater opened in 1928 as a large capacity traditional movie theater, it evolved over the years and has been restored to be a well-known live-entertainment/performance venue. It has a very ornate interior and received numerous award nominations and awards as a live-performance venue.

27. Leong added that in approximately August 2018, Respondent retained ID Pro-Check because their prior vendor seemed unreliable and they sought a higher quality company to handle the checking of patrons' identifications upon their entrance to the licensed premises.

28. On March 8, 2019, aside from the Pro-Check staff, Respondent had approximately 50 of its own staff at the premises. Some staff are servers, like bartenders, while others are posted at fixed positions in and around the licensed premises, and others roam the entire site to detect and address any disturbances, intoxicated patrons, or other problems. After this incident, the bartenders were informed they can request to see the identifications of youthful customers, even if they wore a wristband. He also added extra staff to roam the licensed premises and focus on detecting any under-age persons with alcoholic beverages. He also added approximately 25 surveillance cameras to the existing system, now totaling approximately 50 cameras mounted in and around the licensed premises. They have also focused some of those cameras at the entrance area where identifications are checked and wristbands issued.

LEGAL BASIS OF DECISION

1. Article XX, section 22 of the California Constitution and Business and Professions section 24200, subdivision (a), provide 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 Division 9, rules of the Department, and 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 25658, subdivision (a), provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.

4. Business and Professions Code section 25658, subdivision (d), provides that any on-sale licensee who knowingly permits a person under 21 years of age to consume any alcoholic beverage in the on-sale premises, whether or not the licensee has knowledge that the person is under 21 years of age, is guilty of a misdemeanor.

DETERMINATION OF ISSUES

1. As to count 1, cause for suspension or revocation of Respondent's license does exist under Article XX, section 22 of the California State Constitution and Business and Professions Code section 24200, subdivision (a)-(b), because on March 8, 2019, Respondent's employee, Jessica Johnson, inside the licensed premises, sold or furnished an alcoholic beverage to Sara Doria, a person under the age of 21, in violation of Business and Professions Code section 25658, subdivision (a).

2. The evidence established 20-year old Sara Doria had her identification checked by Respondent's vendor-identification-checkers at the licensed premises entrance. She was issued a wristband and entered the licensed premises. She was thereon sold, served, or furnished an alcoholic beverage by Respondent's bartender, Jessica Johnson. There was no evidence Sara possessed or used a false or counterfeit identification to facilitate her entry to the licensed premises or in obtaining her alcoholic beverage from bartender Johnson. Therefore, there was sufficient evidence to sustain Count 1 of the accusation.

3. As to count 2, 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 section 24200, subdivision (a)-(b), because it was not sufficiently proven that on March 8, 2019, Respondent's agents or employees knowingly permitted O.D., a person under the age of 21, to consume an alcoholic beverage on the licensed premises in violation of Business and Professions Code section 25658, subdivision (d).

4. The Department, as amended at the hearing, pled Count 2 as: "On or about March 8, 2019, respondent licensee agents or employees caused or permitted O.D., a person who was then under 21 years of age, to consume an alcoholic beverage upon the above captioned on-sale premises, in violation of Business and Professions Code Section(s) 25658(d)."

5. Section 25658, subdivision (d), states "Any on-sale licensee who *knowingly* permits a person under 21 years of age to consume any alcoholic beverage in the on-sale premises, whether or not the licensee has knowledge that the person is under 21 years of age, is guilty of a misdemeanor." (emphasis added) Therefore, in this case, it must be proven Respondent or his employees or agents "...knowingly..." permitted O.D., a person under 21 years of age, to consume an alcoholic beverage on the licensed premises.

6. While neither a statute nor a case makes the Alcoholic Beverage Control Appeals Board's opinions binding precedential authority on Department decisions, in *Ovations Fanfare* AB-8551 (2007) it addressed the issue of what constitutes a violation of section 25658, subdivision (d), especially as to that sub-division's knowledge requirement. In that case, minors were found consuming beer on the licensed premises of the Alameda County Fair Grounds during a county fair. The ABC Appeals Board's opinion included an extensive analysis in terms of construing the effect of the knowledge requirement as set forth in section 25658, subdivision (d). It concluded that "...the legislature intended 'knowingly permit' in section 25658(d) to mean something different from the unmodified 'permit' found in section 24200. Therefore, establishing that appellant permitted a violation did not carry the Department's burden to show that appellant knowingly permitted a violation, and the Department's decision must be reversed."

7. In this matter, once Sara and her family, including O.D., rejoined as a group in the licensed premises, Sara, her older sister, and their mother went to a bar-counter where they obtained alcoholic beverages from an unidentified bartender. O.D. remained at a table and did not go near that service counter. Sara obtained two alcoholic beverages and returned back to where O.D. was and gave her one of the two alcoholic drinks. O.D. did consume some of her drink. The group then went to stand at a railing closer to the performance stage and approximately 15-18 feet from service bar. O.D. consumed her drink while at the railing for approximately 30 minutes. Sometime later, Sara obtained her second drink from bartender Jessica Johnson and returned to rejoin O.D. It was very soon thereafter that Sara and O.D. were detained by the ABC Agents.

8. The evidence did not sufficiently establish any of Respondent's employees or agents had any knowledge or should have had knowledge O.D. was in possession of and consuming an alcoholic beverage on the licensed premises. Sara provided O.D. her alcoholic beverage. O.D. was not at the service-counter with Sara when she obtained those first two drinks from an unknown bartender. While O.D. was certainly youthful appearing, she did not otherwise conduct herself in any manner that should have attracted the attention of Respondent or his employees or agents, e.g., she was neither boisterous nor displayed unruly conduct. It was not established any of Respondent's employees or staff came within some close proximity of or had some direct contact with O.D. so as to conclude they had knowledge or should have had knowledge O.D. was consuming an alcoholic beverage in the licensed premises. While security staffer William Douglas followed ABC Agents Ott and Louie as they viewed

activity in the premises, it was not shown Douglas had or should have had knowledge O.D. was consuming an alcoholic beverage inside the licensed premises. In this instance, the mere fact O.D. was consuming an alcoholic beverage on the license premises was not itself sufficient to meet the knowledge requirement contained in section 25658, subdivision (d), to establish a violation of that subdivision. Based upon the above, Count 2 was not adequately proven.

9. Except as set forth in this decision, all other allegations in the accusation and all other contentions the parties made in the pleadings or at the hearing regarding those allegations lack merit.

PENALTY

1. In assessing an appropriate measure of discipline, the Department's penalty guidelines are in California Code of Regulations, title 4, section 144. (Hereafter rule 144) Under rule 144, the penalty for a first violation for selling an alcoholic beverage to a minor is a 15-day license suspension.

2. Rule 144 also permits imposition of a revised penalty based on the presence of aggravating or mitigating factors. The duration of discipline free licensure and positive action taken by the licensee to correct the problem are specifically mentioned factors in mitigation.

3. The Department recommended a 20-day license suspension based on the extremely youthful age and appearance of O.D. and that she was permitted to consume her alcoholic beverage for some time and was never detected by Respondent's agents or employees. Further, Sara was permitted to enter the premises by showing her identification indicating she was only 20 years old and was issued a wrist band she later used to obtain her alcoholic beverage from bartender Johnson.

4. Respondent argued: this was essentially only one violation and Sara's mother bought the first round of drinks; Respondent's bartender-Johnson acted responsibly relying on Sara's wristband; Respondent's employees are thoroughly trained; Respondent had ample security staff; Respondent's bartenders now re-verify the age of those patrons ordering alcoholic beverages if they do not appear at least 30 years old; and the wristband-system is very reliable.

5. As only count 1, a violation of section 25658, subdivision (a), was sustained, rule 144 calls for a 15-day suspension. Rule 144 acknowledges the length of prior discipline free licensure as a factor in mitigation. Respondent has been licensed since 2009 with no prior disciplinary action. That supports a mitigated penalty. Also, it appeared Respondent did have a systematic and deliberate program in place to prevent minors obtaining alcoholic beverages at the licensed premises. It had a large security staff, yet, as it is a bigger venue

accessible to patrons both over and under 21, a large security staff would be expected. Respondent's management appears sincere in taking steps necessary to prevent minors having access to alcoholic beverages. Since this incident, Respondent re-emphasized to its staff the critical nature of that objective. Respondent has also: installed added surveillance cameras; directed its bartenders re-verify the age of those not appearing at least 30 years old who seek to obtain alcoholic beverages, even if they had a wristband; and hired additional roving security staff for its events to focus on detecting minors with alcoholic beverages. Based on these considerations, a downward departure from the 15-day suspension specified in rule 144 is warranted as reflected in the order below.

6. Except as set forth herein, all other arguments raised by the parties with respect to the appropriate penalty did not have merit.

ORDER

1. Count 1 of the accusation is sustained.

2. Respondent's license is suspended for a period of 10 days, with all 10 days of suspension 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 10 stayed-days of suspension, and should no such determination be made, the stay shall become permanent.

3. Count 2 of the accusation is dismissed.

Dated: December 2, 2019

David W. Sakamoto
Administrative Law Judge

☐ Adopt

☑ Non-Adopt: _____

_____

By: _____

Date: 1/10/20