ISSUED APRIL 30, 1996

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

CHANG C. CHOI and LINDA CHOI dba Chef's Take-Out 12411 Burbank Boulevard North Hollywood, CA 91607 Licensees/appellants, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL Respondent.	)	AB-6564 File: 41-282078 Reg: 94030289 Administrative Law Judge at the Dept. Hearing: Theresa Fay-Bustillos Date and Place of the Appeals Board Hearing: February 8, 1995 Los Angeles, CA

Chang C. Choi and Linda Choi, doing business as Chef's Takeout (appellants), appealed from a decision of the Department of Alcoholic Beverage Control[1] which revoked their on-sale beer and wine bona fide public eating place license, for co-appellant Linda Choi pleading nolo contendere to a charge of petty theft, a crime involving moral turpitude, in violation of Penal Code §§484/490.5; and appellants' misrepresentation of a material fact on their application documents submitted in support of their application for a license wherein they failed to inform the department of the conviction.

Appearances on appeal included appellants Chang C. Choi and Linda Choi; and the Department of Alcoholic Beverage Control through its counsel, David W. Sakamoto.

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[1]The decision of the department dated August 1, 1995 is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' type 41 on-sale beer and wine public eating place license was issued on April 8, 1993. Thereafter, the department instituted an accusation charging appellants with misrepresenting a material fact on the license application, and co-appellant Linda Choi having pled guilty to a charge of petty theft, a crime involving moral turpitude.

An administrative hearing was held on December 13, 1994, at which time oral and documentary evidence was received. At that hearing, it was determined that at the time of their application for the license, appellants knew that Linda Choi was being actively prosecuted for a criminal offense, but failed to disclose that fact. Chang Choi alleged that he did not know of the pending criminal charge against his wife at the time of the application, and did not report the matter to the department when he did learn of the charges because he thought the question on the application applied only to felonies.

Subsequent to the hearing, the administrative law judge issued her proposed decision revoking Linda Choi's interest in the license, and while revoking Chang Choi's interest, staying execution as to Chang on certain conditions. The department thereafter rejected the proposed decision pursuant to Government Code §11517(c), which allows the department to reject a proposed decision in whole or in part. The department issued its own decision revoking the license, but giving appellants 180 days to sell the license. Appellants then filed a timely notice of appeal.

In their appeal, appellants raised the following issues: (1) the crime was not

a crime involving moral turpitude, (2) there was no misrepresentation of a material fact, and (3) the penalty was excessive.

DISCUSSION

I

Appellants contended that the crime was not a crime involving moral turpitude, arguing that the crime was not intentional.

The record shows that on February 11, 1993, Linda Choi was charged by way of complaint with the crime of willfully and unlawfully taking, stealing, and carrying away certain personal property belonging to Pacific Super Market, a violation of Penal Code §484. On April 20, 1993, Linda Choi pled nolo contendere to the charge (exhibit 3).

The department proceeded against the license under the authority of Business and Professions Code §24200(d).[2] No definition of what constitutes "moral turpitude" has been given by the Legislature. However, the courts have found certain acts involve moral turpitude, such as crimes involving theft, receiving stolen property, extortion, and fraud (see In re Rothrock (1944) 25 Cal.2d 588, 154 P.2d 392, 393; Re Application of McKelvey (1927) 82 Cal.App. 426, 255 P.834; Re Application of Stevens (1922) 59 Cal.App. 251, 210 P. 422; and Re Application of Thompson (1918) 37 Cal.App.344, 174 P. 86).

The court in Rice v. Alcoholic Beverage Control Appeals Board (1979) 89 Cal.App.3d 30, 37, 152 Cal.Rptr. 285, stated that "moral turpitude is inherent in

[2]The statute states in pertinent part: "The following are the grounds that constitute a basis for the suspension or revocation of licenses:...(d) The plea, verdict, or judgment of guilty, or the plea of nolo contendere to any public offense involving moral turpitude...."

crimes involving fraudulent intent, intentional dishonesty for purposes of personal gain...." See also Ullah (1994) AB-6414, where the crimes of insurance fraud, grand theft, and perjury were held to be crimes of "moral turpitude" and were substantially related to the duties, functions, and qualifications of a licensee.

We determine that the crime pled to by Linda Choi was a crime involving moral turpitude.

II

Appellants contended that there was no misrepresentation of a material fact.

The record shows that on February 3, 1993, Linda Choi committed the crime of petty theft (exhibit 3). There was no evidence whether, at the scene, she was arrested and fingerprinted, arrested and released, or issued a citation only. It is more likely that Linda Choi was cited only, as Chang Choi testified that he first learned of the incident when he received a letter from the Daly City court [R.T. 19].[3]

On February 19, 1993, appellants appeared at the local office of the department preparing to finalize their pending application for a license. Apparently a department employee typed in the forms required from each appellant [exhibit 2]. Chang Choi was asked the questions and he answered for his wife, as she could

[3]We are concerned that no one at the administrative hearing tried to ascertain whether there was an actual arrest, considering the allegations of the accusation. Exhibit 4, not in evidence, a police report of the incident, states by the arresting officer that Linda was cited and released.

But the transcript of the administrative hearing proceedings shows a heavy bias by the administrative law judge and the department's attorney in the assumption throughout the proceedings that Linda Choi was arrested [R.T. 5, 18-19, 22, 27, 32]. The plain fact is that no one knew or seemed to care about this important aspect in the fact-finding proceeding.

not read English; her understanding of English was that of a kindergarten student. Linda did not answer any of the questions [R.T. 19, 23-25]. Chang testified that "...I didn't read it [question 13 concerning pending crimes] and the staff didn't read it to me. And it seemed like a clause asking of any serious crime, and I never--I have never committed serious (sic) crime so I didn't." The department's staff person did not read the question (13) completely to Chang Choi [R.T. 25-27].

We determine that there was no substantial evidence in the record that Linda Choi knew that she was being actively prosecuted as charged in the accusation. We also determine that there is no substantial evidence in the record that Chang Choi or Linda Choi misrepresented any fact within their knowledge.

III

Appellants contended that the penalty was excessive.

The appeals board will not disturb the department's penalty orders in the absence of an abuse of the department's discretion (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287, 341 P.2d 296). However, where an appellant raises the issue of an excessive penalty, the appeals board will examine that issue (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785, 97 Cal.Rptr. 183).

The case of Rice v. Alcoholic Beverage Control Appeals Board (1979) 89 Cal.App.3d 30, 34, 152 Cal.Rptr. 285, concerned a licensee who was convicted in two court proceedings of crimes involving moral turpitude, which occasioned the department to revoke the license, even though one of the licensees was innocent of the crimes pled to by the co-licensee. The Rice court at 89 Cal.App.3d at 39

stated: "The fact that unconditional revocation may appear too harsh a penalty does not entitle a reviewing agency or court to substitute its own judgment therein...nor does the circumstance of forfeiture of the interest of an otherwise innocent colicensee sanction a different and less drastic penalty...." See also Coletti v. State Board of Equalization (1949) 94 Cal.App.2d 461, 209 P.2d 984.

In another matter, Ivankovich (1985) AB-5206 and AB-5207, the co-licensee pled guilty to crimes involving moral turpitude. His innocent spouse, who operated two separate businesses with alcoholic beverage licenses, suffered the penalty of unconditional revocation of both licenses, even though her husband had no part in the actual operation of either business. The appeals board affirmed the department's decision of revocation, and the appeals board's decision was upheld on appellate review.

The appeals board has from time to time stated that with the growing numbers of people of non-English cultures that are vastly increasing in our California communities, there must be at least an awareness that these persons, who conduct business among us, might interpret English words within the context of their own cultural experience.

This does not say that people from different cultures must be treated differently, or with greater concern, but the board does view that the possibility of misunderstanding is ever present, a factor that should be considered. If public forms and documents are to have any meaning in our society, care must be taken to make sure, within reasonable boundaries, that the persons state agencies serve can, within reason, understand the meaning of the words used. This matter is a

classic example of forgetfulness by those who dealt with appellants that there might be a barrier in communication because of language and culture as to the true state of the facts.

Considering the fact that Chang Choi had been licensed over 13 years [R.T. 14], and the lack of effective, true fact-finding by all those who were charged with the duty of ascertaining the truth, the appeals board considers the penalty in this matter of revocation, with 180 days to transfer the license, excessive. This matter does not warrant revocation, conditional or otherwise.

CONCLUSION

The decision of the department is reversed and remanded for reconsideration of the penalty.[4]

RAY T. BLAIR, JR., CHAIRMAN
JOHN B. TSU, MEMBER
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[4]This final order is filed as provided by Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.