

ISSUED MARCH 5, 1997

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

|                         |   |                          |
|-------------------------|---|--------------------------|
| SAM YIM PARK and        | ) | AB-6654                  |
| WON SOO PARK            | ) |                          |
| dba Oak Tree Liquor     | ) | File: 21-229724          |
| 5406 Baldwin Avenue     | ) | Reg: 95032997            |
| Temple City, CA 91780,  | ) |                          |
| Appellants/Licensees,   | ) | Administrative Law Judge |
|                         | ) | at the Dept. Hearing:    |
| v.                      | ) | Marguerite C. Geftakys   |
|                         | ) |                          |
| DEPARTMENT OF ALCOHOLIC | ) | Date and Place of the    |
| BEVERAGE CONTROL,       | ) | Appeals Board Hearing:   |
| Respondent.             | ) | November 6, 1996         |
|                         | ) | Los Angeles, CA          |
|                         | ) |                          |

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Sam Yim Park and Won Soo Park, doing business as Oak Tree Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which suspended their off-sale general license for 45 days, with 15 days stayed for a one-year probationary period, for appellants' clerk having sold alcoholic beverages to persons under age 21, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising out of a violation of Business and Professions Code §25658, subdivision (a).

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<sup>1</sup>The decision of the Department dated March 28, 1996, is set forth in the appendix.

Appearances on appeal include Sam Yim Park and Won Soo Park, appearing through their counsel, Rick A. Blake; and the Department of Alcoholic Beverage Control, appearing through its counsel, David Sakamoto.

#### FACTS AND PROCEDURAL HISTORY

Appellants' license was issued April 28, 1989. Thereafter, the Department instituted an accusation against appellants on June 16, 1996. Appellants requested a hearing.

An administrative hearing was held on February 23, 1996, at which time oral and documentary evidence was received. At that hearing, it was determined that appellants' clerk, Timothy Vasquez, sold a 12-pack of beer to Nikhil Korula, who was 16 years old at the time of the sale, and a can of Lite Beer and a 200 ml. bottle of Jack Daniels distilled spirits to Justin Manuel Aragon, who was 17 years old at the time of the sale. The clerk failed to ask for identification, and none was presented by either minor prior to the sales.

Subsequent to the hearing, the Department issued its decision which suspended appellants' license for 45 days, with 15 days stayed for a one-year probationary period. Appellants filed a timely notice of appeal. In their appeal, appellants assert that the decision is "unreasonable and more severe than appropriate;" i.e., the penalty was excessive, in that: (a) consideration of a prior disciplinary proceeding which had not become final at the time of the conduct giving rise to the present accusation was improper; (b) it was improper to consider a prior disciplinary proceeding which involved conduct of a different type than that which is the subject of the present accusation;

and (c) the Department failed to consider, as a mitigating circumstance, the "physically well-developed" appearance of the minors.

#### DISCUSSION

Appellants contend that the penalty is excessive - in appellants' words, the decision of the Department "is unreasonable and more severe than appropriate."

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

Appellant contends that it was improper and prejudicial for the Department to take into consideration an earlier disciplinary proceeding, charging different violations which had not become final prior to the filing of the present accusation. That matter, which charged appellant with conducting bookmaking activities on the licensed premises, was filed on February 9, 1995, one day prior to the sales to minors charged in the present proceeding, and became final on March 30, 1995.

The Administrative Law Judge (ALJ) initially expressed doubt that the prior proceeding should be considered [RT 10]. However, in her decision, she stated that it had been taken into consideration. She did not, however, explain whether or to what extent it influenced the period of suspension which she ordered and which the Department adopted. However, the Department stressed at the hearing that the

youthfulness of the two minors was the primary factor in aggravation, and the penalty imposed was that requested by counsel for the Department.

Appellant's contention that the penalty was greater because the prior proceeding was considered by the ALJ is incorrect. It does not necessarily follow that because she considered it, she increased the penalty. It is equally possible that she considered it and decided that it should have no effect upon a penalty she thought was otherwise appropriate.

Appellant also contends that since the prior proceeding involved bookmaking activities, rather than sales to minors, it should not have been considered. As stated above, the ALJ's proposed decision recited, without explanation as to extent, that it had been taken into consideration. The penalty imposed was that recommended by counsel for the Department, a recommendation based primarily on the youthfulness of the two minors.

Even though it might be difficult in most cases to determine whether and to what extent weight had been given to prior discipline, that is no reason to prohibit its consideration entirely. This Board does not believe that the period of suspension was excessive, given that the two sales to two different minors occurred on the same day, and in neither instance did the clerk ask for identification. Only if it is reasonably apparent that too much weight has been accorded a prior, dissimilar matter should the Board intervene. While the penalty imposed is substantial, we cannot say it has exceeded the bounds of discretion.

Finally, appellant contends that the Department failed to give due consideration to

the "physically well-developed" appearance of the minors, arguing that it outweighs their "youthful demeanor." However, the ALJ was in a position where she could observe both their demeanor and their physical appearance, and the weight to which each of such factors might be entitled. In addition, given the absence of any testimony from the clerk who made the sale, there is nothing to indicate that the physical appearance of the two minors in any way contributed to the clerk's failure to request identification.

Considering these factors, the appropriateness of the penalty must be left to the discretion of the Department. The Department having exercised its discretion reasonably, the Appeals Board will not disturb the penalty.

#### CONCLUSION

The decision of the Department is affirmed.<sup>2</sup>

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

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<sup>2</sup>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.