

ISSUED JANUARY 4, 1999

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

KWI OK KIM	)	AB-7013
dba Flamingo Club)	
4001 W. Sixth Street	)	File: 48-290158
Los Angeles, CA 90020,	)	Reg: 97039621
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	John P. McCarthy
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	October 7, 1998
	)	Los Angeles, CA
)	

Kwi Ok Kim, doing business as Flamingo Club (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which conditionally revoked her on-sale general public premises license, with revocation stayed for a probationary period of two years, including a 55-day suspension, for appellant permitting the service of an alcoholic beverage to a person exhibiting obvious signs of intoxication, for purchasing alcoholic beverages from a supplier not authorized by law to provide the beverages, and for permitting 11 persons under the age of 21 years to remain in the premises, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and Business and Professions Code §24200, subdivisions (a) and (b), arising from violations of Business and Professions Code §§23402; 25602,

¹The decision of the Department, dated December 31, 1997, is set forth in the appendix.

subdivision (a); and 25665.

Appearances on appeal include appellant Kwi Ok Kim, appearing through her counsel, Rick A. Blake, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on August 2, 1994. However, before the current license was issued, appellant was licensed for four months in 1987 with an on-sale beer license, and from July 1987, with an on-sale general public eating place license.

Thereafter, the Department instituted an accusation against appellant charging that a person, under the age of 21 years, was furnished and consumed an alcoholic beverage while exhibiting obvious signs of intoxication; that appellant purchased alcoholic beverages from an unauthorized distributor; and allowed 58 persons under the age of 21 years to remain within the premises.

An administrative hearing was held on October 14, 1997, at which time oral and documentary evidence was received. The Department recommended unconditional revocation of the license.

Subsequent to the hearing, the Department issued its decision which dismissed the under-age furnishing and consuming, and 47 of the counts of a "minor" remaining in the premises, conditionally revoking the license, and ordering a 55-day suspension.

Appellant thereafter filed a timely notice of appeal. In her appeal, appellant raises the issue that the penalty is excessive.

DISCUSSION

Appellant contends the penalty is 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 Department's penalty order revoked the license but stayed the imposition of the revocation of the license for a period of two years. The apparent intent of this course of action was to impress appellant that allowing such a group of minors within the premises would not, hereafter, be tolerated.

The Department in its Determination of Issues IV sets forth the generally imposed suspension times, adding up to a total of 45 days. The suspension ordered was for 55 days.

We are faced with the same quandary, a conditional revocation of a license with a substantial actual suspension, as we faced in the matter of Almendrea & Eubanks (1998) AB-6864. In that matter, the license was conditionally revoked, and a 25-day suspension ordered, for disorderly house violations, law enforcement problem violations, public nuisances, and failure to correct objectionable conditions. We concluded that, while the stayed revocation was properly imposed to insure conformity to law, the 25-day suspension was excessive, when combined with the stayed revocation penalty. The Appeals Board stated:

"We conclude that the penalty of 25 days suspension is excessive under the facts of this case, and needs be reduced to ensure any penalty discussed is not for the purpose of punishment, but to insure compliance with the laws and rules of the Department. (Cornell v. Reilly (1954) 127 Cal.App.2d 178 187 [273 P.2d 572, 576-577].)"

We see no reason to change our views, especially under the facts of the present appeal. The assessment of a penalty is not the mere adding a series of

possible or usual penalties, but an exercise of discretion tempered with reasonableness. It is the intent of the laws under which the Department operates, that penalties are to command future conformity, not by way of punishment, with the goal of a controlled exercise of the license.

We conclude that the penalty of 55 days is excessive.

ORDER

The decision of the Department is affirmed, except that portion of the penalty ordering a total of 55 days as a suspension is reversed, with the matter remanded to the Department for reconsideration of penalty.²

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

JOHN B. TSU, MEMBER, did not participate in the oral argument or decision in this matter.

² *This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §23090.7 of said code.*

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