

ISSUED SEPTEMBER 3, 1999

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

CHOI & KOO INTERNATIONAL, INC.	)	AB-7192
dba Aikan)	
3575 Wilshire Blvd.	)	File: 41-311292
Los Angeles, CA 90010,	)	Reg: 97041985
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	John P. McCarthy
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	June 3, 1999
	)	Los Angeles, CA

Choi & Koo International, Inc., doing business as Aikan (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which conditionally revoked its on-sale beer and wine eating place license for a probationary period of 36 months, provided appellant serves a 30-day suspension, for a violation of Business and Professions Code §25607 (unlawful possession of distilled spirits), and a 20-day suspension² for allowing a patron to remain while in such a state of intoxication the patron could not reasonably care for his own safety, being contrary to the universal and generic public welfare and morals provisions of

¹The decision of the Department, dated July 9, 1998, is set forth in the appendix.

²The two suspensions of 30 days and 20 days were to run consecutively, for a total suspension of 50 days.

the California Constitution, article XX, §22, and Business and Professions Code §24200, subdivision (a), arising from violations of Business and Professions Code §24200, subdivision (b), and §25607.

Appearances on appeal include appellant Choi & Koo International, Inc., appearing through its counsel, Rick Blake, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine eating place license was issued on January 10, 1996. Thereafter, the Department instituted an accusation against appellant charging a total of eight counts: four counts of appellant illegally possessing distilled spirits contrary to its license; two counts of sale and consumption of an alcoholic beverage to, and by, a minor; and two counts of patrons allowed to remain within the premises while in an intoxicated condition.

An administrative hearing was held on April 27, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the violations and the prior record showing that on two occasions, in 1996 and 1997, appellant also possessed distilled spirits without authority under its beer and wine license (Finding XI).

Subsequent to the hearing, the Department issued its decision which determined that only two counts were proven -- possession of spirits and allowing one intoxicated person to remain in the premises, and that the license should be sanctioned as set forth above. Appellant thereafter filed a timely notice of appeal.

In its appeal, appellant raises the following issues: (1) the decision and the findings are not supported by substantial evidence, and (2) the penalty is excessive.

DISCUSSION

I

Appellant contends the decision and the findings are not supported by substantial evidence, arguing that there is no evidence the intoxicated person had been in the premises for an appreciable time for appellant to have allowed or permitted the person to remain.

Supervising Department investigator Judy Matty testified that upon entering the premises, she saw three persons a few feet from the exit, coming toward her, apparently on their way out of the premises.³ Two of the persons were positioned on either side of the third person, Sean Ahn, who appeared extremely intoxicated, and could not stand by himself [RT 10-12, 22].

Finding III(B)(2), states:

“A person who was subsequently identified as Sean Ahn was seen inside the licensed premises in an extremely inebriated state. When first seen, Ahn was being helped by friends who appeared to be trying to remove him from the premises. He could not stand on his own. When Supervising Investigator Matty asked the friends to let him go, his knees collapsed. The friends grabbed him before he hit the ground. Ahn’s eyes had difficulty focusing, he could hardly talk, his clothes were badly disheveled and he was barely lucid. No evidence established that Ahn was leaving the premises due to any action by representatives of respondent (appellant).”

³The investigator did state that Ahn was moving “about the premises” and there was pandemonium inside (apparently seeking to connect the pandemonium with Ahn). However, these apparently gratuitous remarks seem to be modified by the investigator’s testimony she first saw Ahn a few feet from the exit as he was being carried out [RT 22].

Finding VII, states:

“Sean Ahn was permitted by respondent (appellant) to remain in the premises while he was in an intoxicated condition, unable to care for his own safety.”

Determination of Issues II, states:

“Cause for suspension of respondent’s [appellant’s] license was established in accordance with the Constitution and code sections cited above and Findings of Fact, paragraphs III and VII, permitting violation of California Code Section 647(f).”

The mere fact that Ahn was in the premises being “carried” out, is only marginally helpful -- the time of observation of Ahn by any witness who testified at the hearing was extremely short, and the only testimony is that of investigator Matty, and all she saw was Ahn being helped out of the premises from a position a few feet from the intended exit.

There are no facts that the two “friends” were or were not employees doing their duty on finding an intoxicated person entering the premises -- apparently the only reason the Administrative Law Judge (ALJ) used the term “friends” was that designation was used by the Department’s investigator during her testimony. No one at the hearing inquired upon what basis did the investigator conclude or speculate, that the two were friends of Ahn.

There are no facts as to the size of the restaurant, except that it had two or three entrances. There are two entrances from the parking lot, and possibly a third entrance which opens onto a side street [RT 28].

However, it appears to the Board that the conclusion of the Department finding a violation was based on reasonable inferences from this rather sparse record. Since

Ahn was first seen by the Department investigator in such a condition he could not walk, Ahn could not have “just” walked into the premises from any of the two or three entrances, been immediately seen, and escorted out by the two “friends.” This then strongly implies that Ahn was in the premises, entering some time prior to the loss of his ability to care for himself (by walking). From the time he apparently entered under his own power, he must have become intoxicated must likely from consumption within the premises, to the extent he lost use of his powers of self-locomotion.⁴ Under these circumstances, appellant would have breached its duty to observe and evict Ahn.

II

Appellant contends the penalty is excessive, arguing that the Department improperly considered the decision of March 12, 1998, as a prior violation.

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 ordered the license conditionally revoked, stayed for a period of three years, and a 30-day suspension.

Finding III(B)(3), states:

⁴We view as highly speculative that Ahn over-consumed elsewhere and while at the premises, began to feel the effects of his over-consumption leading to his loss of self-mobility, within the premises.

“Three, 375 ml., bottles labeled Chung Sanli Byukgyesoo, neutral spirits distilled from grain and sweet potato, with honey added, were found inside the licensed premises in a lettuce box in (sic) pantry area. The bottles were sealed and the label indicated “24% alc. by vol.”

Finding XII, states in pertinent part:

“At the hearing, counsel for the Department recommended that respondent’s (appellant’s) license be revoked outright. The basis for the recommendation is that this is the third accusation involving distilled spirits on a premises licensed only for beer and wine.

“Respondent [appellant] urged that the decision in registration 97040319 [the second decision concerning possession of distilled spirits on the premises] should not be considered in framing appropriate discipline in this case, if any, because nothing established that the licensee had notice of that occurrence until after the occurrence of the instant matter [the present appealed matter – the third decision concerning possession of distilled spirits on the premises].”

. . . .

“The Order which follows is intended as a final warning to respondent (appellant) that it is not permitted under the license it holds to possess distilled spirits of any kind, or their mixtures or dilutions.”

Appellant’s license which was issued on January 10, 1996, is a beer and wine license which excludes possession, sales, and service of distilled spirits.

Five months after issuance of the license on June 14, 1996, appellant was found in possession of “Green,” a Souju distilled spirit, and suffered a 10-day suspension. Six months thereafter on December 20, 1996, appellant was found in possession of the same brand of distilled spirits as so found in June 1996, suffering a 25-day suspension with 10 days stayed. Again, six months later on June 12, 1997 (the current violation), appellant was found in possession of distilled spirits (for the third time), and suffered the stayed revocation, with 30 days suspension.

From a review of the record, it appears to the Board that the Department’s decision as to penalty is based upon reasonable grounds. There is a reasonable

progressive increase in the penalties as to the three violations. The stayed revocation in the present matter will be meaningless provided appellant stops the apparent practice of having distilled spirits on the premises, or, applies for, and receives, a general license.

Order

The decision of the Department is affirmed.⁵

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

⁵This 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 in §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.