

ISSUED OCTOBER 24, 2000

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

KWANG H. YOO and YOUNG JA YOO	)	AB-7546
dba Cardiff Liquor)	
114 Aberdeen Drive	)	File: 21-236753
Encinitas, CA 92007,	)	Reg: 99046562
Appellants/Licensees)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Rodolfo Echeverria
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	August 3, 2000
	)	Los Angeles, CA

Kwang H. Yoo and Young Ja Yoo,¹ doing business as Cardiff Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control² made pursuant to Government Code §11517, subdivision (c), which revoked their license for their clerk having sold an alcoholic beverage (a bottle of vodka) to each of two persons under the age of 21, being contrary to the universal and generic public welfare and morals provisions of the California Constitution,

¹ Although her name remains in the caption, Young Ja Yoo is deceased.

²The decision of the Department, dated December 22, 1999, and the proposed decision, which was not adopted, are set forth in the appendix.

article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant Kwang H. Yoo, appearing through his counsel, John J. McCabe, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on October 26, 1989. An accusation filed May 25, 1999, charged, in two counts, that, on April 2, 1999, appellants, through their clerk, Seokwoo Yang, sold an alcoholic beverage, a bottle of vodka each, to Ashley Livesay and Jennifer M. Whisler, both of whom were then approximately 16 years of age.

An administrative hearing was held on July 22, 1999. With both minors present, counsel for the Department and appellants stipulated that the facts set forth in counts 1 and 2 of the accusation were true and correct; that appellants wished simply to present evidence in mitigation of the penalty; and that the Department's witnesses, if called to testify, would testify as indicated in the Department's Report of Investigation (Exhibit 3), which would be admitted into evidence.

Thereafter, Nam Hee Cho, pastor of the N Sung Presbyterian Church in Oceanside, California, testified about appellant Kwang H. Yoo's role as a founder of the church and holder of positions of secretary of education and secretary of finance, his reputation among the congregation as a moral leader, and a substantial donor to the church. Cho also described instances where he provided emotional

and prayer support to Yoo while Yoo's wife was hospitalized and terminally ill.³

Yoo testified that he came to the United States in 1984. Prior to that time, he had been employed by American companies operating in Viet Nam and Saudi Arabia. Yoo, 73, acquired the store in 1989. He conceded that there had been four previous sale-to-minor violations,⁴ and that he was aware of reports of purchases by other minors. The sale in question was made by his 23-year-old grandson while Yoo had gone for coffee. Yoo was responsible for one of the earlier violations, his wife and a clerk were the sellers in the other two instances. Yoo said the sale he made to a minor occurred near closing time, and he blamed it on his preoccupation with his wife's illness and money worries.

Department counsel, without challenging appellants' showing of hardship, recommended outright revocation, pointing to the fact that this was the store's fifth such violation since it was licensed, the three most recent occurring within a 36-month period. Appellants' counsel urged the Administrative Law Judge (ALJ) to stay revocation to permit the store to be sold.

The ALJ ordered appellants' license revoked, but stayed the revocation for 180 days, subject to an actual suspension of 60 days and indefinitely thereafter until the business was sold. If the business is not sold within the stayed period, the Director could, without further notice, enter an order revoking the license. The ALJ reasoned as follows (Findings of Fact IV and V):

³ According to Cho, Yoo's wife died May 16, 1999.

⁴ Exhibit 2 discloses that the violations occurred on June 29, 1990; October 1, 1993; May 16, 1996; and December 21, 1996.

“In mitigation of the penalty recommended by the Department, the Respondent, Kwang H. Yoo, testified that his wife and co-licensee, Young Ja Yoo, passed away recently after a prolonged illness which required that she be hospitalized for almost two years, that he incurred a debt of approximately fifty thousand dollars as a result of his wife’s prolonged illness and hospitalization, that he is seventy-three years old, that he is in poor health, that the profits from the business are his only source of income, that he would have to close his store if his alcoholic beverage license is revoked, that he is three quarters of one year short of qualifying for social security benefits and that he would like an opportunity to work for three additional quarters to qualify for his social security benefits and an opportunity to sell his store and alcoholic beverage license so that he can pay his debts off and live off his social security benefits. (Finding of Fact IV.)

“Although revocation of the Respondents’ license is indicated in light of the prior disciplinary history ... and the fact that the Respondent’s [sic - grandson] sold vodka to two sixteen year old minors, it is not necessary that the surviving respondent be further punished by depriving him of the value of his alcoholic beverage license which can be used to pay off his substantial medical bills arising from his wife’s prolonged illness and hospitalization. Additionally, it would be in the State’s interest to allow the respondent to complete three additional quarters of work so that he can qualify for social security benefits and therefore not become a public charge. In light of the Respondent’s testimony as stated above which was considered as a mitigating factor in the imposition of a penalty herein, the Respondent should be given a reasonable time to sell his alcoholic beverage license.” (Finding of Fact V.)

The Department declined to adopt the proposed decision, and instead issued its own decision pursuant to Business and Professions Code §11517, subdivision (c), revoking appellants’ license. In so doing, it adopted all of the ALJ’s factual findings, with the exception of Finding of Fact V. In its own Finding of Fact V, the Department stated:

“While the Respondent has demonstrated that the revocation of his alcoholic beverage license will no doubt impose on him an economic hardship, deterrence of future violations and uniformity of penalties must also be considered in the assessment of the proper penalty. In addition, in the assessment of penalty in this matter there was a consideration for the hardship on society, law enforcement, and certainly on relatives of those who become victims of alcohol-related crimes and offenses.’

The Department's order also added a new Determination of Issues III, stating:

"After consideration of all the factors relating to penalty, including evidence relating to the history of the licensee, the evidence concerning the factual circumstances of the instant case, and those items discussed in Findings of Fact contained herein, it is determined that the appropriate penalty in this instance is revocation of the Respondent's alcoholic beverage license."

Appellant has filed a timely appeal, and contends that the Department has abused its discretion in ordering revocation.

DISCUSSION

Appellants contend the Department abused its discretion by failing to consider this case on its individual merits. Instead, appellants contend, the Department "is applying its no exceptions policy to licensees who suffer a third violation within 36 months involving sales to minors." Appellants contend that, despite the provisions of Government Code §11517, subdivision (c), the Department should not be permitted "to substitute its view to the proposed decision of the ALJ."

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 may examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

The proposed decision of the ALJ and the decision of the Department reflect a different focus and possibly competing philosophies, the resolution of which lies

beyond the reach of the Appeals Board.

The ALJ was obviously sympathetic to the personal and economic hardships appellant Yoo will be forced to endure if not given an opportunity to recoup the value of his on-sale general license. By opting for a stayed revocation and indefinite suspension, the ALJ effectively took Yoo out of the liquor business without destroying the residual value his store would possess by reason of a transferable license.

The Department, on the other hand, has justified its position by stressing the need for deterrence of future violations and uniformity of penalties, as well as its consideration of the hardship on society and law enforcement, and the relatives of victims of alcohol-related offenses. These would, to a point, appear to be legitimate considerations. These do not appear to be mere recitals intended to disguise arbitrary action - there is no evidence to suggest that. Indeed, but for the personal hardship issue, the store would be a prime candidate for outright revocation. Appellants' store, located in the Southern California beach community of Cardiff, had accumulated a total of five sale-to-minor violations in ten years. In addition, based upon the stipulated testimony of the minors, there were other, undetected, sales to minors, and the store had acquired a reputation as a place where minors could purchase alcohol. (See RT 5-6 and Exhibit 3.)

Case law says that if reasonable minds might differ as to the propriety of the penalty imposed, that fact serves to fortify the conclusion that the Department acted within the area of its discretion. (Harris v. Alcoholic Beverage Control Appeals Board (1965) 62 Cal.2d 589 [43 Cal.Rptr. 633, 636].)

We believe the decision must be affirmed. It is unfortunate that the consequence may be that appellant Yoo will become a public charge, but it cannot be said the Department's action was wholly beyond reason.

ORDER

The decision of the Department is affirmed.⁵

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁵ This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

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