

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

AB-8089

File: 21-352366 Reg: 02052816

GYEONG HWA YUN dba Young Ellis Produce and Grocery
396-398 Ellis Street, San Francisco, CA 94102,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Michael C. Cohn

Appeals Board Hearing: November 13, 2003
San Francisco, CA

ISSUED FEBRUARY 13, 2004

Gyeong Hwa Yun, doing business as Young Ellis Produce and Grocery (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked her license for her employees having, on nine occasions, purchased cigarettes and distilled spirits believing them to be stolen, a violation of Penal Code section 496, subdivision (a).

Appearances on appeal include appellant Gyeong Hwa Yun, appearing through her counsel, Richard D. Warren, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on April 7, 1999. Thereafter, the

¹The decision of the Department, dated February 6, 2003, is set forth in the appendix.

Department instituted a nine-count accusation against appellant charging that her agents, servants or employees, Jin Hong Yun and Jinku Chong, on nine occasions purchased property believed to have been stolen.

An administrative hearing was held on November 21, 2002, at which time oral and documentary evidence was received. At that hearing, appellant stipulated to the truth of the allegations in each of the nine counts. Subsequent to the hearing, the Department issued its decision which determined that the charges of the accusation had been established and appellant had not established a defense to any of them.

Appellant thereafter filed a timely notice of appeal. In her appeal, appellant contends that the Department abused its discretion in its imposition of penalty.

DISCUSSION

Appellant contends that the Department normally imposes only an order of stayed revocation plus a suspension where the purchase of stolen property has been by an employee. She asserts that there is no substantial evidence to support the Department's unconditional order of revocation, a penalty she claims is normally imposed only in cases where the licensee is personally involved in the unlawful activity.

Appellant and Jin Hong Yun were husband and wife during the October, November, and December 2000 period when cigarettes and distilled spirits were purchased from an undercover San Francisco police officer. The Yuns were divorced in March 2002. Jin Hong Yun worked at the store when appellant was not present, and was the purchaser of the supposedly stolen property on six of the nine occasions.

The accusation did not allege wrongdoing by appellant, but the decision (Legal Conclusion 2) found involvement on her part:

The Department seeks revocation of the license. There is ample basis to support that penalty. Purportedly stolen property was purchased in the premises by respondent-licensee's employees on nine occasions in a span of seven weeks. Three of those sales involved alcoholic beverages. Respondent-licensee directly approved her employee's purchasing purportedly stolen cigarettes on two occasions. She was aware of the attempted sale of purportedly stolen alcoholic beverages on another and did nothing to discourage it. Six of the nine purchases were made by respondent-licensee's husband, a man who respondent felt was incapable of running the business yet whom she nevertheless left in charge of the premises when she was not present. These facts alone are sufficient to support revocation of the license.

The conclusion that appellant directly approved of her employee's purchase of stolen cigarettes on two occasions is based upon Factual Findings 13, 14, 16, and 17:

13. The purchases of purportedly stolen property set forth in Counts 1 through 9 were all made from a San Francisco Police Department undercover police officer. When the officer went to the premises on October 30, 2000 (Count 2), Jinku Chong and respondent-licensee were both working behind the counter. The officer spoke with Chong. He offered to sell him cigarettes that he said had been stolen from Costco by a friend. Chong turned and spoke to respondent-licensee in a language the officer could not understand. After respondent nodded her head in what the officer perceived to be an affirmative manner, Chong opened the register, took out some money, and handed it to the officer to purchase the cigarettes.

14. When the officer went to the premise again on November 6, 2000 (Count 4), Chong and respondent-licensee were again both behind the counter. The officer carried the cigarettes in a gym-type bag. He put it on the counter and showed its contents to Chong. He again said the cigarettes had been stolen from Costco. Again, Chong spoke to respondent in a language the officer could not understand before purchasing the cigarettes from the officer.

16. Respondent-licensee testified she does not recall seeing the undercover officer talking with Jinku Chong. She denied that she ever had conversations with Chong about buying cigarettes.

17. Despite her denial and asserted lack of recollection, it is found that respondent-licensee was aware of, and approved, Chong's purchase of

purportedly stolen property on two occasions: October 30 and November 6, 2000. On each of those occasions, after being offered the stolen property by the officer, Chong spoke to respondent-licensee, after which he made the purchase. On at least one of those occasions, respondent nodded affirmatively to Chong after he spoke to her. The strong inference to be drawn from these facts is that respondent-licensee knowingly approved Chong's purchase of stolen property. Respondent-licensee was also present on November 7, 2000, when the officer attempted to sell purportedly stolen alcohol to Chong. Although no sale was made, and there was no evidence that Chong discussed the potential sale with respondent-licensee, after two prior sales of purportedly stolen property, including one on the preceding day, it can be inferred that respondent-licensee knew the officer was again trying to sell stolen property. Yet she took no steps to discourage her employee from discussing that sale.

Appellant argues that it is "pure speculation" that Chong's conversation with appellant had anything to do with the undercover officer's offer to sell stolen cigarettes to Chong. At best, appellant's argument is only partly correct. We think the timing of Chong's conversation with appellant, and Chong's payment for the cigarettes only after appellant's affirmative nod, compels the conclusion that appellant approved of the purchase. On the other hand, without proof that Chong told appellant the cigarettes had been stolen, it cannot be said with the degree of certainty that is asserted in Legal Conclusion 2 that appellant knowingly participated in the purchase of purportedly stolen property. The same is true of the occasion when Chong was shown purportedly stolen alcoholic beverages but elected not to purchase any. Appellant was not asked if she overheard any of the conversations between Chong and the undercover officer. Appellant may have observed the interchange between Chong and the officer, but it is only conjecture that appellant knew the beverages had supposedly been stolen.

The other basis for unconditional revocation - that six of the purchases were by appellant's husband, "a man whom respondent-licensee felt was incapable of running the business yet whom she nevertheless left in charge of the premises when she was

not present,” effectively penalizes appellant for entrusting her then-husband to work in the store in her absence. Even if the decision’s characterization of appellant’s assessment of her husband’s business skills can be said to be a fair assessment of her belief, it hardly seems of such substance as to be a reason to elevate a penalty to the level of an unconditional revocation.

There is no question but that appellant must be held responsible for the acts of her employees. Such vicarious responsibility is well settled by case law. (*Morell v. Department of Alcoholic Beverage Control* (1962) 204 Cal.App.2d 504 [22 Cal.Rptr. 405, 411]; *Harris v. Alcoholic Beverage Control Appeals Board* (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315, 320]; and *Mack v. Department of Alcoholic Beverage Control* (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629, 633].)

That being said, the fact is that the Department ordinarily does distinguish, in its choice of appropriate discipline, between acts committed directly by a licensee and acts of employees which are imputed to a licensee. In this case, the only substantial evidence is that appellant was not personally involved, so it cannot be said that her conduct involved moral turpitude. This persuades us that the Department should reconsider its order.

Appellant contends that the Department initially intended to seek revocation on the theory that Rule 58 so required, referring to the “ABC 309” form, and points out that the decision explicitly declined to find that the rule might apply. The Department argues that the contents of the ABC 309 form are irrelevant. Given that the decision is not based on Rule 58, we are inclined to agree that the contents of the form are irrelevant,

and have no bearing on the disposition of this appeal.

ORDER

The decision of the Department is reversed as to penalty, and the case is remanded to the Department for such further proceedings as may be appropriate in light of our comments herein.²

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

² 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.