ISSUED MARCH 21, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

KWI OK KIM dba Flamingo Club 4001 W. Sixth Street Los Angeles, CA 90020, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7298 File: 48-290158 Reg: 98043604 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: January 20, 2000 Los Angeles, CA

Kwi Ok Kim, doing business as Flamingo Club (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked her on-sale general public premises license for having permitted a number of persons under the age of 21 to enter and remain in the premises without lawful business, and for having only a single security guard on the premises in violation of a condition on her license, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §§25665 and 23804.

Appearances on appeal include appellant Kwi Ok Kim, appearing through her

[1]The decision of the Department, dated December 3, 1998, is set forth in the appendix.

counsel, Rick A. Blake, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on August 2, 1994. Thereafter, the Department instituted an accusation against appellant which contained 44 counts, each charging that she permitted a minor to enter and remain in the premises without lawful business,[2] and one count charging a violation of a condition on her license which required the presence of two security guards on the premises during business hours and one-half hour after closing.

An administrative hearing was held on October 21, 1998, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which sustained the charge concerning the condition violation, and fourteen of the counts involving minors on the premises.[3]

Appellant thereafter filed a timely notice of appeal. In her appeal, appellant raises the following issues: (1) the Department improperly considered a pending

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[2] Business and Professions Code §25665 provides:

"Any licensee under an on-sale license issued for public premises, as defined in Section 23039, who permits a person under the age of 21 years to enter and remain in the licensed premises without lawful business therein is guilty of a misdemeanor. Any person under the age of 21 years who enters and remains in the licensed public premises without lawful business therein is guilty of a misdemeanor and shall be punished by a fine of not less than two hundred dollars ($200), no part of which shall be suspended."

[3] Appellant stipulated to the presence of the minor on the premises, in 14 of the 44 counts, where the minor was present and prepared to testify. The remaining 30 counts, where no minor had appeared, were dismissed. Business and Professions Code §25666 requires the Department to produce at the hearing for examination any minor allegedly having entered and remained in the premises.

accusation which was not final; (2) the Department made findings based upon speculation rather than evidence; and (3) the Department imposed an excessive penalty. The issues are sufficiently related to be addressed together.

DISCUSSION

Appellant contends that the Department improperly took into consideration the pendency of a prior accusation (Registration No. 97039621) which also charged, among other things, that appellant had permitted minors to enter and remain in the premises. According to appellant, this resulted in an unjustified aggravation of the penalty, since the Department's decision in that matter was pending before this Board.[4]

The Department argued that the fact that a hearing in the earlier matter took place only three days before the bulk of the events which formed the basis for the matter presently on appeal put appellant on notice that there was an existing problem in connection with minors on the premises. That she permitted the same problem to reoccur, the Department argued, could be considered an aggravating factor with regard to penalty.

Appellant argues in its brief (at page 4):

> "To allow the Department to consider the fact that a hearing had been held three days prior to the occurrence of these three violations[5] as aggravation and support for a penalty of revocation, ignores proper legal principles. Without proof of the violation having been established (finality) there simply is no prior. What if, for some reason, the case was reversed in full? The fact that a prior violation not yet final at the time of the hearing in this matter alleged that on one date eleven minors were found on a public premises does not constitute 'no regard whatsoever for Business and Professions Code Section 25665' nor that

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[4] The Board affirmed the Department's decision in that matter, but reversed the penalty as excessive. Kwi Ok Kim (January 4, 1999) AB-7013.

[5] Two of the "three" violations involved, respectively, one minor having been permitted to enter and remain on the premises without lawful business, and thirteen minors having been so permitted.

appellant has a 'substantial problem with the operation and control of her premises' as alleged in Determination of Issues IIIA & C of the decision."

Appellant's rhetorical question "What if, for some reason, the case the was reversed in full?" is somewhat disingenuous, in that, in the prior case, appellant had stipulated to the presence of the minors, and the appeal issue had to do with the penalty.

Admittedly, there is a fine line between the Department's reliance upon a prior decision which is pending on appeal for purposes of penalty enhancement, and its reliance on the fact that the hearing which led to that decision put appellant on notice, if she had not been on notice theretofore, that it was unlawful for her to permit minors to enter and remain in the premises without lawful business. That line was not crossed here. In spite of such notice, appellant permitted history to repeat itself.

Indeed, appellant should have known from the onset of the prior proceeding that the Department, and the law, took a dim view of minors being permitted in her premises. The hearing simply brought that matter to a head, and appellant did not even contest the basic issue - that minors had been permitted to enter and remain without lawful business.

That no steps were taken to prevent a recurrence - indeed, the failure to have the required complement of security guards on duty - supports the Administrative Law Judge's conclusion that appellant had no regard for the pertinent statute.

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].)

We believe that, while the order of revocation may be harsh, it cannot be said to

have been an abuse of discretion. The Department was entitled to its belief that appellant showed such disdain toward the problem as not to deserve a license. It is not to be forgotten that what was involved was the presence of large numbers of minors in her premises, when, if appellant had acted responsibly, there should have been none.

ORDER

The decision of the Department is affirmed.[6]

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

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[6] 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.