

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

KYUNG MI and YONG JIN JEON	)	AB-7092
dba Café Jin)	
4690 Convoy Street, Suite 109	)	File: 47-315931
San Diego, CA 92111,	)	Reg: 97040021
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 12, 1999
	)	Los Angeles, CA

Kyung Mi and Yong Jin Jeon, doing business as Café Jin (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 25 days, with 5 days stayed for a probationary period of one year, for appellants selling alcoholic beverages without the purchase of food, 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, subdivision (a), arising from a violation of Business and Professions Code §23804.

¹*The decision of the Department, dated April 2, 1998, is set forth in the appendix.*

Appearances on appeal include appellant Kyung Mi and Yong Jin Jeon, appearing through their counsel, William A. Adams, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on April 5, 1996. Thereafter, the Department instituted a four-count accusation² against appellant charging that co-licensee Yong Jin Jeon, on March 1 and March 5, 1997, served alcoholic beverages to Department investigators and San Diego police officers without accompanying sales of food, in violation of one of the conditions on the license.³

An administrative hearing was held on February 23, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Department investigators Jennifer Powley and Paul J. Hayes; San Diego police detective William Frew; appellants' attorney, William A. Adams; and by appellants, Yong Jin Jeon and Kyung Jeon.

On March 1, 1997, Powley, in an undercover capacity, entered the premises, sat at the bar, and ordered a glass of wine from co-appellant Yong Jin Jeon (Yong), who was behind the bar. Powley told Yong that she was waiting for a friend and would not be eating [RT 9-10]. Shortly thereafter, Hayes entered and joined Powley at the bar. Hayes was also operating undercover, but Yong recognized Hayes as a Department investigator and Yong greeted him as Hayes

² *A separate count was charged for each of the four officers who ordered alcoholic beverages.*

³ *Condition 8 states: "At all times when the premises are open for business, the sale of alcoholic beverages shall be made only in conjunction with the sale of food to the person ordering the beverage."*

entered the premises [RT 12, 27]. Hayes was the Department investigator who had worked with appellants when they inquired about the removal of a condition on their license that prohibited live entertainment [RT 59].

Hayes sat down next to Powley and ordered, was served, and paid for a beer [RT 12-14, 27]. When Yong served the beer to Hayes, he also placed a small bowl of pretzels and raisins on the bar in front of Hayes and Powley [RT 13, 29]. Hayes then talked to the appellants about some Korean food that he saw being served in the restaurant, but neither Hayes nor Powley was told that they had to order food with their drinks [RT 11, 15, 28]. Powley asked for a receipt and received one that showed the cost of her glass of wine and Hayes' beer, but no food [RT 14-15]. Hayes and Powley left the premises after 20 or 25 minutes [RT 15, 28].

On March 5, 1997, Frew and detective sergeant Rooney entered the premises, sat at the bar, and ordered beers, which were served to them by Yong [RT 31-32]. They were not told they had to order food with their drinks and were not given menus. Yong placed a bowl of pretzels and raisins on the bar for them [RT 33]. While there, they observed a person eating what appeared to be an entree [RT 35]. Frew and Rooney left the premises after 15 or 20 minutes [RT 33].

Subsequent to the hearing, the Department issued its decision which determined that appellants had violated condition 8 as charged in the accusation.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) the Department failed to prove that the "snack food" served by appellants to the officers did not meet the requirement of the condition that the person ordering an alcoholic beverage must also purchase

“food”; 2) appellants were justified in relying on the conduct of a known Department investigator; and 3) if a condition violation occurred, the penalty was excessive without proof of aggravating factors.

DISCUSSION

I

Appellants contend that snack food, such as the pretzels and raisins served by appellants along with the alcoholic beverages that the officers ordered, is “food” meeting the requirement of the condition. They cite the definition of “food” in Health and Safety Code §109935:

“(a) Any article used or intended for use for food, drink, confection, condiment, or chewing gum by man or other animal.
 (b) Any article used or intended for use as a component of any article designated in subdivision (a).”

The Department does not address this issue on appeal. At the administrative hearing, the Department made a faint attempt to equate “food” with the term “meals” used in Business and Professions Code §23038, the section that defines a bona fide public eating place.⁴ They are quite clearly not equivalent terms. A meal must include food, but food need not be a meal.

What appellants served with the drinks was clearly “food” under both the statutory and common sense definitions of that word. However, we conclude there was no “sale” of food with the sale of the alcoholic beverages. The snack food was simply gratuitous and, therefore, appellants did not comply with the condition.

⁴ *That section provides, in relevant part:*

“ ‘Meals’ means the usual assortment of foods commonly ordered at various hours of the day; the service of such food and victuals only as sandwiches or salads shall not be deemed a compliance with this requirement. . . . Nothing in this section, however, shall be construed to require that any food be sold or purchased with any beverage.”

II

Appellants contend they were justified in relying on the conduct of a known Department investigator that appeared to ratify their practice of serving pretzels and raisins when an alcoholic beverage was purchased. When the investigators left without any indication that appellants were doing anything wrong, appellants argue, the investigators' conduct justifiably left appellants confident that they were conducting their business correctly. When the San Diego police detectives came in several days later, appellants acted in accordance with the belief instilled in them by the investigators.

Appellants state, on page 8 of their brief:

“The Department had the opportunity to instruct or warn Mr. and Mrs. Jeon as to its interpretation of Condition Eight, but chose instead to entrap and mislead them. The Department's conduct in this matter was patently unfair.”

Appellants point out that, since the Jeons recognized Hayes as a Department investigator, we would have to assume that appellants “knowingly flaunted a condition violation in front of ABC officers” if they believed that they were not in compliance with the condition.

Regardless of what occurred after investigator Hayes entered the premises, the condition was violated with regard to investigator Powley, since she did not order anything to eat with her glass of wine. Appellants did not refuse to serve her or tell her that she must also order food with her drink; they did not even give her snack food.

The situation changed, however, when Powley's friend entered. Yong immediately recognized Hayes as the Department investigator who helped them a few months before when appellants wanted to modify the conditions on the license. After a friendly greeting, Hayes had a friendly conversation with both appellants regarding some food and drinks served at the restaurant. Hayes had a beer, which was served

with pretzel and raisin “snack food,” and eventually left without ordering any food and without giving any indication to appellants that they were doing anything wrong. Under the particular circumstances of this case, Hayes, by his silence, approved what appellants were doing.

It is reasonable that appellants would continue to do with others, such as the San Diego police detectives who came in a few days later, what had been tacitly approved by Department investigator Hayes. Whether or not Hayes intended to mislead appellants, they were misled into believing that the Department approved their manner of doing business. Appellants should not be disciplined for relying on the conduct of an acknowledged Department representative, upon whom appellants had relied before with regard to one of the other conditions on their license. The determinations with regard to Hayes and the two San Diego police officers must be reversed.

III

Appellants contend that the penalty of 25 days' suspension with 5 days stayed is too severe for a first violation.

Even though there was a violation in the case of investigator Powley, this penalty is out of all proportion to the single violation remaining, and appears punitive rather than remedial. The penalty must be reversed and remanded to the Department to reconsider the appropriate penalty in light of our reversal of three of the four violations.

ORDER

The decision of the Department is affirmed as to Count 1 of the accusation, but reversed as to Counts 2, 3, and 4, and the penalty is reversed and remanded to the Department for reconsideration.⁵

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

⁵*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.