ISSUED JULY 14, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

YONG KOOK SONG dba The Korner Pocket Billiards 3840 McKinley Street, #A Corona, CA 91719, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7384 File: 40-326416 Reg: 98043867 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: June 6, 2000 Los Angeles, CA

Yong Kook Song, doing business as The Korner Pocket Billiards (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his license for 15 days for his having caused or permitted a 20-year-old minor to consume an alcoholic beverage in the licensed premises, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions

[1]The decision of the Department, dated March 18, 1999, is set forth in the appendix.

Code §25658, subdivision (b).

Appearances on appeal include appellant Yong Kook Song, appearing through his counsel, Edward J. Blum, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer license was issued on February 4, 1997. Thereafter, the Department instituted an accusation against appellant charging that he sold an alcoholic beverage to a minor, and caused or permitted the consumption of an alcoholic beverage by that minor and a second minor.

An administrative hearing was held on January 5, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Dustin Heaton ("Heaton"), the minor in question, and Shawn Ramos ("Ramos"), an investigator for the Department of Alcoholic Beverage Control, and by Yong Kook Song ("appellant.")

Subsequent to the hearing, the Department issued its decision which determined that the evidence did not sustain the charge that an alcoholic beverage was sold to the minor, but was sufficient to support the charge that he had been permitted to consume an alcoholic beverage while in the premises. The charge involving the second minor, who did not appear, was dismissed.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) the decision that appellant violated §25658, subdivision (b), is not supported by the findings; and (2) there is not substantial

evidence in the record to support a finding of a violation of Business and Professions Code §25658, subdivision (d). These issues are sufficiently interrelated to be discussed together.

DISCUSSION

Appellant argues that the evidence and findings are insufficient to show that he knowingly violated §25658, subdivision (d).

Appellant's basic argument is that subdivision (b) of §25658, upon which the Department has based its decision, was not violated, and that the evidence will not support the decision under subdivision (d), the subdivision upon which the charge, if any, should have been based.

Section 25658, subdivision (b), provides:

> "Any person under the age of 21 years who purchases any alcoholic beverage or any person under the age of 21 years who consumes any alcoholic beverage in any on-sale premises is guilty of a misdemeanor."

Section 25658, subdivision (d), provides:

> "Any on-sale licensee who knowingly permits a person under the age of 21 years to consume any alcoholic beverage in the on-sale premises, whether or not the licensee has knowledge that the person is under the age of 21 years, is guilty of a misdemeanor."

Appellant contends that the finding that appellant had an opportunity to discover that the minor was consuming beer, had he been more vigilant, is not an adequate substitute for the "knowingly" requirement of §25658, subdivision (d).

The controlling facts are relatively simple. Heaton testified, and the Administrative Law Judge found, that Heaton drank two glasses of beer which

came from pitchers of beer purchased by Heaton's friend, Bruce Boucher. Appellant denies having seen Heaton consuming any beer, even though appellant claims he paid special attention to Heaton because Heaton had earlier displayed false identification to appellant's wife.

The Department has argued in this and in other cases that it is entitled to proceed under subdivision (b) on the theory that the licensee permitted the consumption by creating the circumstances which made it possible and was then negligent in preventing it from occurring, and, as a result, violated Business and Professions Code §24200 by causing or permitting a violation of §25658, subdivision (b).

Appellant's argument, that where there is a specific statute directed at certain conduct, and a more general statute which can be applied to such conduct, the charge must brought under the specific statute, is unpersuasive, given the facts of this case.

Where, as here, alcoholic beverages are dispensed in quantities sufficient to serve more than one person - in this case, Boucher was furnished a pitcher of beer and two mugs - in an on-sale premises which numbers minors among its clientele,[2] there is a special responsibility on the seller to ensure that the persons who share that alcoholic beverage with its purchaser are of legal drinking age. That the sharing occurs in such a manner that it goes unseen or unnoticed by the seller

[2] We assume that appellant offers food to its patrons, so as not to be classified as a public premises under Department Rule 67.

cannot relieve him of liability. This is because he knowingly created the risk, which then materialized, and did not have adequate controls in place to prevent it. Thus, it can fairly be said that in so doing, he permitted a violation of §25658, subdivision (b), and violated §24200 by doing so.

ORDER

The decision of the Department is affirmed.[3]

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

[3] 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.