ISSUED OCTOBER 8, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

KIL YE KANG dba Muse Salon and Cafe Muse 540 South Vermont Avenue Los Angeles, CA 90020, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6990 File: 47-291743 Reg: 97039633 Administrative Law Judge at the Dept. Hearing: John A. Willd Date and Place of the Appeals Board Hearing: August 12, 1998 Los Angeles, CA

Kil Ye Kang, doing business as Muse Salon and Cafe Muse (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked her license for appellant employing individuals for the purpose of procuring or encouraging the purchase of alcoholic beverages; those employees accepting drinks purchased for them by Los Angeles police officers; those employees being permitted to loiter in the premises for the purpose of begging or soliciting customers to purchase alcoholic beverages for such employees; one of the employees soliciting a police officer to purchase a drink intended for that police officer; appellant permitting one of the employees to loiter in the premises for the

[1]The decision of the Department, dated November 20, 1997, is set forth in the appendix.

purpose of soliciting customers to purchase an alcoholic beverage for that employee; and appellant and/or her employees violating conditions that had been imposed on the 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 §§ 23804; 25657, subdivisions (a) and (b); Rule 143 (4 Cal.Code Regs. §143); and Penal Code 303, subdivision (a).

Appearances on appeal include appellant Kil Ye Kang, appearing through her counsel, Rick Blake, and the Department of Alcoholic Beverage Control, appearing through its counsel, David Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on February 22, 1994. Thereafter, the Department instituted an accusation against appellant charging that, on June 27, 1997, the violations noted above occurred at appellant's premises.

An administrative hearing was held on September 9, 1997, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Los Angeles Police Department officers Nelson Fong and James Yoshida, who were at the premises in an undercover capacity on June 27, 1997. They testified to the events of that evening that resulted in the accusation at issue in this appeal.

Subsequent to the hearing, the Department issued its decision which determined that the violations had occurred as charged and that they were premeditated and deliberate.

Appellant thereafter filed a timely notice of appeal. In her appeal, appellant argues that the penalty of revocation is excessive in this case.

DISCUSSION

Appellant contends the penalty of revocation is excessive in light of all the evidence.

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

Appellant points out that, in spite of the eight counts in the accusation, there was only one incident involved on a single evening. The Department charged violations of three statutes and one Department rule, all dealing with various aspects of what were basically B-girl violations.[2-] One count included six sub-

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[2] Count 5 of the Accusation alleged, and the Department's decision found (Finding III, Count 5) and determined (Determination of Issues V), that Kum Ja Kang solicited Officer Fong to purchase a drink intended for the consumption of Officer Fong, in violation of Rule 143. Such a solicitation is not a violation of Rule 143, and, therefore, Determination of Issues V must be reversed.

counts alleging violations of conditions on the license. Two of the four conditions involved are essentially prohibitions of B-girl activities.

While there is some redundancy in the violations charged, that does not outweigh the fact that appellant employed these two young women for the purpose of soliciting drinks from and acting as companions to customers in clear and knowing violation of statutes, a regulation, and conditions on the license to which appellant had specifically agreed. Appellant makes no attempt in this appeal to deny the violations charged.

The violations here were a result of a practice that is apparently acceptable and usual in another culture. The officers, when they entered the premises, were asked if they knew "Korean style," which officer Fong explained as the practice of the customer buying a bottle of alcoholic beverage which he then shares with a female companion supplied by or employed by the licensed premises. The female companions, or "hostesses," are usually given a tip at the end of the evening; in the present situation, one of the women said her tip was usually $100 or $200 [RT 21, 30].

In his order, the ALJ said "it is obvious by the repeated questions put to the officers that the [appellant] was fully aware that she was violating conditions imposed upon her license. It has been established that the violations set forth above were premeditated and deliberate." This determination was clearly a consideration in the penalty imposed. Appellant argues that B-girl and condition

violations are almost always premeditated and deliberate, that is, they do not happen through mistake or inadvertence as can happen with some violations, such as sales to minors. Therefore, premeditation and deliberateness should not be aggravating circumstances, since they are inherent in any B-girl violation, and the penalty of revocation based on those circumstances, according to appellant, is unsupportable.

It may be that B-girl violations are usually premeditated and deliberate violations. However, the conscious engineering of deliberate violation of the statutes and license conditions by the licensee was particularly obvious and egregious in this instance. Whereas in some B-girl cases, the licensee is found to have permitted the violations only because of imputation to the licensee of the acts and knowledge of his or her employees, appellant in this case was shown not only to be cognizant of the activities, but to have intended that the illegal activities take place. Also, the conditions that were agreed to were fairly specific in prohibiting conduct that is integral to the "Korean style" service that the officers encountered. A previous disciplinary action, dated January 5, 1995, and considered by the Department in imposing the penalty of revocation, was also the result of condition violations.[3]

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[3] Another disciplinary action against appellant as the result of alleged condition violations was the subject of an appeal to this Board. (Kil Ye Kang (June 9, 1997) AB-6717.) In that appeal, the findings and determinations were affirmed in part and reversed in part, the penalty was reversed, and the matter was remanded to the Department for reconsideration of the penalty. AB-6717 was determined by the ALJ not to be final at the time of the administrative hearing in

There is a clear implication here of the licensee signing the conditional license, but not intending to abide by the conditions or at least at some point not considering them important enough to stop her from engaging in what she knew was a prohibited practice. It is this implication of disregard for or flouting of both the general rules governing licensees and the specific conditions to which appellant explicitly agreed that convinces this Board, as it did the Department, that continuation of this license would be contrary to public welfare and morals.

CONCLUSION

The decision of the Department is affirmed, with the exception of Determination of Issues V, which is reversed. The reversal of Determination of Issues V, however, is not sufficient to warrant the reversal of the penalty of revocation.[4-]

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

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the present matter and was not considered in imposing the penalty.

[4-]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 decision as provided by §23090.7 of said code.

Any party, before this final decision becomes effective, may apply to the appropriate 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.