

ISSUED JULY 6, 2001

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

CHONG IL and SANG HEE KIM	)	AB-7629
dba C & Y Discount Store)	
101 East Beach Street	)	File: 20-296925
Watsonville, CA 95076,	)	Reg: 99046667
Appellant s/Licensees,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Jeevan S. Ahuja
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	February 15, 2001
	)	San Francisco, CA

Chong Il and Sang Hee Kim, doing business as C & Y Discount Store (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their off-sale beer and wine license for appellant Chong Il Kim having sold an alcoholic beverage (a six-pack of Budweiser beer) to Luis Martin, a minor, 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 Code §25658, subdivision (a). The violation was found to be

¹The decision of the Department, dated April 13, 2000, together with the proposed decision of the Administrative Law Judge, is set forth in the appendix.

appellants' third such violation within a 36-month period.

Appearances on appeal include appellant Chong Il and Sang Hee Kim, appearing through their counsel, Haeyoung Lee, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 11, 1994. Thereafter, the Department instituted an accusation against them charging the sale by appellant Chong Il Kim of an alcoholic beverage to a minor, in violation of Business and Professions Code § 25658, subdivision (a), and further alleging that appellants had committed two prior sale-to-minor violations, established in decisions dated February 25, 1997, and April 13, 1998, respectively.²

An administrative hearing was held on September 28, 1999, at which time oral and documentary evidence was received. At that hearing, it was stipulated by appellants that the charge of the accusation was true. The Department then placed in evidence documents establishing the prior violations, rested its case, and advised the Administrative Law Judge that it was recommending that appellants' license be revoked. Appellants then presented the testimony of appellant Chong Il Kim³ and Young Rho in mitigation.

Appellant Kim testified that, on the day in question, he was very tired and

² According to exhibits 2 and 3, introduced at the hearing, the violations were committed on November 9, 1996, and February 28, 1998. The sale in the present case was on January 22, 1999.

³ As used hereinafter, "Kim" refers to appellant Chong Il Kim.

sick, having driven five or six hours returning from a short vacation at Lake Tahoe, and that he had also taken a number of doses of Nyquil to treat a cold, and was dizzy. When the minor brought the beer to the counter, there were customers lined up behind him. Kim thought the minor did not appear to be over 21, so asked for identification. However, when Kim examined the driver's license, he checked only the month and year, and mistook the date of birth as 1979 rather than 1977. He also testified that he was holding the license at the bottom when he examined it, and his thumb obscured the red stripe with the 2000 date. Kim said he was aware that a third violation could result in the loss of his license, so had pursued a practice of asking everyone for identification.

On cross-examination, Kim admitted that he was the seller on the two prior occasions, and had not taken any training in the interim, but intended to do so shortly. He blamed the sale on a combination of pressure to serve other customers who were in line, fatigue, illness and the mistaken examination of the minor's identification.

Kim's testimony persuaded the ALJ that mitigation was deserving, reflected in the order accompanying the proposed decision which permitted appellant an opportunity to sell his license - although appellants' license was revoked, revocation was stayed for 180 days, conditioned upon an actual 60-day suspension, followed by an indefinite suspension, to permit the sale or transfer of the license.

The Department elected not to adopt the ALJ's decision, instead making its own decision pursuant to Government Code § 11517, subdivision (c), and ordered appellants' license revoked. In its decision, the Department agreed with the ALJ

that Kim's action in opening the store while fatigued from a long drive, ill, under the possible influence of Nyquil, reflected poor judgment, but parted company with the ALJ that mitigation was present. In the Department's words, "poor judgment is not mitigation."

The Department further concluded (Finding VII) that Kim's cursory examination of the minor's identification, and his failure to note the clause "Age 21 in 2000," could as much have been the result of Kim's lack of training as from his physical condition, and at the very least he was extremely careless, to the point of recklessness, by selling after believing the minor did not look old enough and after checking his identification.

The Department rejected appellants' argument that loss of the license would result in the loss of Kim's livelihood because he lacked other skills or experience to seek employment, stating that there was no substantial evidence that this was the case. In addition, the Department stated that appellants had not introduced any substantial evidence that the store must sell beer and wine to remain economically viable, and held that appellants' economic considerations were also not mitigation. Finally, the Department explained the basis for its decision to order revocation in the following way (Determination of Issues IV):

"B. Reasonable minds may differ about the propriety of the discipline ordered below. The fact that reasonable minds may differ fortifies the conclusion that the Department acted within the scope of its discretion. ...

"C. Some may argue that the discipline ordered below is too harsh. The purpose is not to punish respondents, but to insure compliance with laws and protection of the public, and to act as a deterrent to other licensees in this extremely important area of sales to minors violations. Given the aggravation set forth in Finding VII above, the discipline ordered is within the

Department's discretion and the permissible range of options set by the legal criteria. ... The fact that the penalty may have severe consequences for respondents does not take it beyond the Department's discretion. ... The penalty is not clearly excessive. ... Nor does the circumstance of forfeiture of the interest of an otherwise innocent co-licensee sanction a different and less drastic penalty. ..." (Citations omitted.)

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants contend that the Department abused its discretion by declining to extend to appellants the opportunity to transfer their license. Appellants contend that the Department's order goes beyond what is necessary to protect the public welfare and morals, especially in light of the ALJ's determination that mitigating factors had been shown.

DISCUSSION

It is well settled that the Department has a very broad discretion when the question is what is appropriate discipline. (Harris v. Alcoholic Beverage Control Appeals Board (1965) 62 Cal.2d 589 [43 Cal.Rptr. 633, 636]; Martin v. Alcoholic Beverage Control Appeals Board (1959) 52 Cal.2d 287 [341 P.2d 296].)

In Martin, supra, the California Supreme Court sustained an order of revocation where there had been repeated violations of the Alcoholic Beverage Control Act, and where it appeared to the court that lighter penalties had proved "wholly ineffective" to discourage the unlawful conduct.

The parallel in this case is remarkable. Despite two prior violations, both of which he personally committed, Kim apparently took no steps to undergo training in the detection of minors. Only after the third violation did he enroll in a Department training program, one he had not yet begun at the time of the hearing. The

Department could reasonably have been concerned that leniency would only result in further transgressions in the future.

The Department articulated the factors upon which it relied for its determination that outright revocation was an appropriate penalty. It cannot be said that the Department relied upon inappropriate considerations, particularly where, as here, the Legislature, in its enactment of Business and Professions Code §25658.1, has made it clear that the Department has the discretion to order revocation where there have been three sale-to-minor violations within a 36-month period. Under such circumstances, it cannot be said that it abused its discretion.

ORDER

The decision of the Department is affirmed.⁴

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴ 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.