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

AB-8823
File: 48-26095 Reg: 07065318

IVAN HEE CHIN KIM, dba Grasshopper
5100 Fountain Avenue, Los Angeles, CA 90029,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: May 7, 2009
Los Angeles, CA

ISSUED AUGUST 18, 2009

Ivan Hee Chin Kim, doing business as Grasshopper (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his license for having, by or through his employees, permitted the sale of cocaine in the licensed premises, in violation of Business and Professions Code section 24200.5 in conjunction with Health and Safety Code sections 11055, 11350, and 11352.

Appearances on appeal include appellant Ivan Hee Chin Kim, appearing through his counsel, Rick A. Blake, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

---

[1]The decision of the Department, dated February 1, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on November 7, 1977. Thereafter, the Department instituted a 26-count accusation against appellant charging that appellant, through his agent or employee, permitted a patron to sell, furnish or give away a controlled substance consisting of cocaine, and knowingly permitted the sale or negotiations for such sales of narcotics and dangerous drugs.

An administrative hearing was held on December 4, 2007, at which time documentary evidence was received and testimony concerning the violation charged was presented. Subsequent to the hearing, the Department issued its decision which determined that all but one of the counts of the accusation were sustained by the evidence. The evidence established that sales and negotiations for sales of cocaine took place on each of 13 separate visits to the premises by Department investigators, some of them by one of appellant's bartenders.

Appellant filed a timely notice of appeal in which he contends that the penalty is excessive. He does not dispute that the drug sales took place, but claims he had no knowledge that they were occurring, and challenges the severity of the order of revocation.

DISCUSSION

Appellant contends that the Department abused its discretion by imposing an excessive penalty. He points out that he has held his license for 30 years with only four instances of discipline, that he has been ill since 2002, and unable to spend more than a few hours daily at the premises, that he has only the income from the bar and his social security, and that he has cautioned his staff against the kind of conduct that

occurred. He argues that the decision fails to explain why some lesser penalty would not have been adequate to protect the public welfare and morals, such as a requirement that the license be sold or transferred, an alternative that would permit him to realize some of the value of the on-sale general license.

The Department argues that the penalty was within the Department's discretion, that it is warranted by the serious nature of the conduct which occurred, and further justified by the legislative concern reflected in Business and Professions Code section 24200.5, subdivision (a), which imputes licensee knowledge where there have been successive sales of narcotics over a continuous period of time, and mandates revocation.

The cocaine sales involved in this case extended over a six-month period, and were primarily the work of one patron. The premises' restroom was the location of most of the transactions, and it is unrealistic to assume that there were only transactions with Department investigators. The comings and goings of two patrons to the restroom at the same time, one of them the same in most cases, in the clear view of the bartenders, was the "smoke" that warned of fire, but was knowingly or negligently ignored.

It is well settled that the Appeals Board may 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].) The Department is granted great discretion in imposing penalties. Even though “reasonable minds might differ as to the propriety of the penalty imposed, . . . this fact serves only to fortify the conclusion that the Department acted within the broad area of

discretion conferred upon it." (*Martin v. Alcoholic Beverage Control Appeals Board*, *supra*, at 52 Cal.2d 294.

There are a number of factors that support the Department's choice of penalty in this case, foremost of which are the number of transactions and the likelihood of others, the direct involvement of appellant's bartender in several of them, appellant's lack of oversight of his employees, and the stigma associated with a place where drugs were readily available. All pointed to the removal of the license.

The results may well be unfortunate for appellant, but his interests can not come before those of the general public. The Board, in an earlier case with similar facts, quoted with approval from a Department decision which recognized that a premises' reputation as a source of illegal drugs was inconsistent with a continuing license:

> The facts of this case, and the reasonable inferences to be drawn from them, especially the pattern of drug trafficking in the premises by a premises employee and patrons during the evening hours, lead to the conclusion that the public can be protected only by preventing an alcoholic beverage licensed business from continuing at the premises location for some length of time into the future.

(Cianciola (2000) AB-7382.)

While it is true that the ALJ did not discuss the alternatives to outright revocation, this is not a case where the Board could reasonably expect an order less than outright revocation if we were to remand the case to the Department for reconsideration.

> The evidence overwhelmingly supports the decision, and its very nature explains why the ALJ arrived at the penalty he proposed. It comes as little surprise, then, that the Department elected to impose the same penalty as it had when it first heard the case. Indeed, the Board anticipated such action when it stated, in dicta, its belief "that the findings in count 4 alone would be sufficient justification for the penalty ... ."
>
> The Board could well itself have sustained the penalty rather than remanding it to the Department for reconsideration. (See *Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 635 [166 Cal.Rptr. 826].)

(*Inland Pacific Investments*, *LLC* (2006) AB-8361a.)

ORDER

The decision of the Department is affirmed.[2]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

---

[2] 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.