

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

Du Hee Bae
Dba Pharos Shrine
2999 W. 6th St.
Los Angeles, CA 90020

Licensee(s).

File: 47-393075

Reg: 16084808

**PRECEDENTIAL DECISION
No. 18-02-E**

DESIGNATION AS PRECEDENTIAL DECISION

Pursuant to Government Code Section 11425.60, the Department of Alcoholic Beverage Control hereby designates as precedential its decision, dated January 26, 2018, in the above-referenced action.

This decision is designated precedential effective September 4, 2018.



JACOB APPELSMITH, Director
Department of Alcoholic Beverage Control

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**IN THE MATTER OF THE ACCUSATION
AGAINST:**

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DECISION UNDER GOVERNMENT CODE SECTION 11517(c)

The above-entitled matter having regularly come before the Department on January 26, 2018, for decision under Government Code Section 11517(c) and the Department having considered its entire record, including the transcript of the hearing held on May 24, 2017, before Administrative Law Judge Matthew G. Ainley, and including the written arguments of the parties, and good cause appearing, the following decision is hereby adopted:

The Department seeks to discipline the Respondent's license on the grounds that, on or about June 17, 2016,

- (1) he employed or permitted two individuals to solicit or encourage others to buy them drinks in the licensed premises under a commission, percentage, salary, or other profit sharing scheme in violation of California Business and Professions Code section 24200.5(b);¹ and
- (2) he employed two individuals for the purpose of procuring or encouraging the purchase or sale of an alcoholic beverage, or paid them a percentage or commission for procuring or encouraging the purchase or sale of an alcoholic beverage, in the licensed premises in violation of section 25657(a).

As is typically the case with b-girl violations, the counts overlap to some degree. In connection with these alleged violations, the Department also seeks to discipline the Respondent's license on the grounds that, on or about June 17, 2016, the Respondent failed to comply with two of the conditions attached to his license in violation of section 23804. (Exhibit 1.)

¹ All statutory references are to the Business and Professions Code unless otherwise noted.

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on May 24, 2017.

PRELIMINARY ISSUE

On or about September 6, 2017, the Department adopted the proposed decision submitted by the Administrative Law Judge. On or about September 19, 2017, counsel for the Department filed a Petition for Reconsideration Pursuant to Government Code Section 11521. The Director thereafter granted the Petition for Reconsideration and rejected the proposed decision pursuant to Government Code section 11517. Counsel for the licensee, Mr. Kaplan, objected to the granting of the Petition for Reconsideration on the ground that the Department had not served him with a copy of the Petition and the licensee was thus deprived of the opportunity to contest the Petition for Reconsideration.

Following the procedures required by Government Code section 11517(c)(2)(E), counsel for both the Department and the licensee had the opportunity to submit written argument to the Director for consideration. Mr. Kaplan again asserted that the Petition for Reconsideration was not properly served and thus the licensee was denied due process. In response, Department counsel acknowledged that the Petition for Reconsideration had not been served on Mr. Kaplan, asserting that such failure was inadvertent. In any event, the Petition had been served on the licensee's former representative (prior to hearing) Lee Rabun and on the licensee itself.

While it is unfortunate that the Petition for Reconsideration was not served on Mr. Kaplan, there is no evidence that it was intentional, and the failure to do so does not constitute a denial of due process, nor does it violate any statutory requirement. Government Code section 11521 provides that any party to a proceeding may seek reconsideration of a decision adopted by the Department. The Department's authority to order reconsideration expires 30 days following the mailing or delivery of such decision (or earlier, if an earlier date is ordered to be the effective date). While it is expected that such a petition will be served on all parties (or their respective counsel), and indeed is required so as to avoid an improper *ex parte* communication (of which there is no allegation or evidence of such a violation here), the statute does not include any specific right to respond to a Petition for Reconsideration.

The granting of a Petition for Reconsideration is not the end of the matter if it results in the Department rejecting the proposed decision. As indicated, Government Code section 11517(c) provides the procedure that must be employed following the rejection of a proposed decision. That procedure gives all parties appropriate due process. In the instant case, the licensee requested and was provided a copy of the record, and submitted written argument for consideration. The licensee has had a full opportunity to argue all issues presented in this matter. Even if it may be determined that the inadvertent failure to serve Mr. Kaplan with the Petition for Reconsideration constitutes a violation of some sort, there is no prejudice shown.

FINDINGS OF FACT

1. The Department filed the accusation on October 10, 2016.
2. The Department issued a type 47, on-sale general eating place license to the Respondent for the above-described location on April 15, 2005 (the Licensed Premises).
3. The Respondent's license has been the subject of the following discipline:

| <u>Date Filed</u> | <u>Reg. No.</u> | <u>Violation</u> | <u>Penalty</u> |
|-------------------|-----------------|------------------|----------------|
| 1/8/2016 | 16083548 | BP § 25632 | 15-day susp. |

The foregoing disciplinary matter is final. (Exhibit 2.)

4. On January 10, 2004, the Respondent executed a petition for conditional license containing 16 conditions. (Exhibit 5.) These conditions provided, in part, that:

“14. Private/semi-private (Karaoke) rooms (hereinafter “the rooms”) constructed on the premises shall have the following characteristics: (a) All doors shall remain all clear glass with the exception of the frame. The windows shall also be of clear glass and be no smaller than 18” height x 36” width beginning no higher than 54” from the floor. No curtains, blinds, or drapes shall be placed or attached, fastened or connected in any manner to any section of wall or ceiling which obstructs the view of any portion of the interior of the room.”

15. No employee or agent shall be permitted to accept money or any other thing of value from a customer for the purpose of sitting or otherwise spending time with customers while in the premises, nor shall the licensee(s) provide, permit, or make available, either gratuitous or for compensation, male or female patrons who act as escorts, companions or guests of and for the customers.”

5. On June 17, 2016, Ofcr. Guan Young Oh, LAPD, entered the Licensed Premises with his partner, Ofcr. Phillip Choi. They were greeted by Jeong In Park. Park was wearing an off-white shirt, black pants, and a radio device. Ofcr. Oh told Park that they would like a karaoke room. Park asked a male employee to escort them to room 12.
6. Ofcr. Oh and Ofcr. Choi entered the room, which had a table, a big-screen TV with karaoke equipment, and disco lights. They asked the male employee for a drink menu, which he obtained for them.

7. Park entered the room and asked him what they wanted to drink. Ofcr. Oh ordered a bottle of Scotch. After a brief discussion, he ordered a Glenfiddich Scotch. A male server brought the Scotch and a fruit plate.
8. A female who identified herself as Julie entered the room. She was dressed in black and stood to one side. Ofcr. Choi selected her. She poured drinks for the three of them from the bottle of Glenfiddich.
9. Three more women entered the room and stood in front of the table. Ofcr. Oh dismissed them. A male server entered the room and said that a police inspection was underway and that they would have to wait 15 minutes or so for more females.
10. Julie received a phone call about the police activity, after which she excused herself and exited. Park led Julie back inside and apologized.
11. A male server led another female, Kayla, into the room. After Ofcr. Oh selected her and she sat down. Kayla and Julie poured glasses of Scotch for the two officers, then poured drinks for themselves.
12. After a while, the officers told Park that they needed to leave. They asked her for the bill, which she brought to them. The bill was in two pages, one handwritten, one printed. (Exhibit 4.) It showed the purchase of a Glenfiddich (18 yr.) combo for \$365. The combo included two Voss waters, 5 Hite beers, and another item which was listed in Korean only.² The bill also showed the purchase of a Monster energy drink for \$5.
13. Ofcr. Oh asked Park about the unconsumed portion of the bottle of Scotch. She indicated that they could save it for 30 days and gave him a piece of paper on which to write his name.
14. Ofcr. Oh then asked Park how much he had to pay the females. Park responded that he had to pay \$100 for anything over 30 minutes. Park then told Julie and Kayla that the officers needed to leave. She told Ofcr. Oh to pay them \$100 each. Ofcr. Oh objected that Kayla had only been in the room for 20 minutes and offered \$50 instead. Park insisted that he pay \$100, ultimately agreeing on \$80. During this discussion, Park told Kayla to leave the room and that she would obtain her money for her.
15. After Ofcr. Oh and Ofcr. Choi exited the Licensed Premises, Agent Jason Groff entered. He contacted Yun Young Kim³ at the front counter. Kim was dressed in a white blouse and black

² Ofcr. Oh, who speaks Korean, indicated that the fruit plate was one of the items listed on the bill. He did not translate the Korean writing on the bill; by the process of elimination, this last item was the fruit plate.

³ Korean does not directly translate into English letter for letter. Thus, Agent Goff identified Kim as Kim Yunkyung, while the Respondent, testifying through an interpreter, identified her as Yun Young Kim. Further

pants. Agent Groff told Kim that he was going to perform an inspection and began walking through the Licensed Premises.

16. Agent Goff noticed that the karaoke rooms all had dark tint on the glass portion of the doors and on the windows. He took a photo of the door for room 12 (exhibit 7) and the window (exhibit 8) next to it. The doors and the windows for the other rooms were tinted in the same manner.

17. The Respondent testified that the karaoke rooms had glass doors and windows. There were no blinds, curtains, or drapes on them. The windows had the image of an Egyptian firebird on them, which covered a small part of the window. Even with the image on the window, a person could see into the rooms. After being notified of this case, the Respondent removed the images from the windows.

18. The Respondent further testified that none of the windows nor the glass in the top portion of the doors were tinted. He indicated that the glass in the lower portion of the door was tinted. After being notified of this case, he removed the tinting.

19. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.

2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.

3. Section 24200.5(b) provides that the Department shall revoke a license "[i]f the licensee has employed or permitted any persons to solicit or encourage others, directly or indirectly, to buy them drinks in the licensed premises under any commission, percentage, salary, or other profit-sharing plan, scheme, or conspiracy."

4. Section 25657(a) provides that it is unlawful "[f]or any person to employ, upon any licensed on-sale premises, any person for the purpose of procuring or encouraging the purchase or sale of

complicating matters, family names in Korean are listed first, while in English they are listed last. It is clear from the testimony that both witnesses were referring to the same person. For convenience, she will be referred to as Yun Young Kim or Kim throughout this proposed decision.

alcoholic beverages, or to pay any such person a percentage or commission on the sale of alcoholic beverages for procuring or encouraging the purchase or sale of alcoholic beverages on such premises.”

5. Cause for suspension or revocation of the Respondent’s license was **not** established for the violations of sections 24200.5(b) and 25657(a) alleged in counts 2, 3, 4, and 5. (Findings of Fact ¶¶ 5-14.)

6. With respect to section 24200.5(b), there was no evidence that Julie (count 3) or Kayla (count 5) directly or indirectly solicited any drinks. There was no evidence that they requested drinks, or that they otherwise indicated indirectly their desire that the officers provide them with drinks. The fact that they poured themselves drinks without asking or being asked to do so is not sufficient to constitute solicitation under the facts presented in this case.

7. With respect to section 25657(a), there are two particular elements, relevant here, that must be established for there to be a violation: (1) that Julie or Kayla was employed by the licensee, and (2) that one was so employed “for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages.”

8. While there was little evidence of employment presented, it was sufficient: staff of the licensee made the females available upon request, at one time presenting several from which the two officers could select; Park and other staff directed their movements, as evidenced by Julie being returned to the room by Park, who also apologized for Julie’s absence, and Park also directing Kayla to leave the room while she (Park) collected Kayla’s payment on her behalf; and Park informed Ofcr. Oh how much he had to pay Julie and Kayla, and actually negotiated the price as to Kayla. Taken together, this is sufficient to establish an employment relationship under the circumstances here.

9. As for whether Julie and Kayla were employed “for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages,” the Department urges that the provision of females to act as companions to the male patrons here, and their subsequent involvement in the pouring and consumption of alcoholic beverages, is circumstantial evidence that they were employed or permitted to encourage the patrons to buy them drinks. In contrast, respondent argues that the evidence must establish an actual, direct solicitation of drinks by the person(s) involved.

10. Both parties cite *People v. Holstun* (1959) 167 Cal.App.2d 479 in support of their respective positions. *Holstun* involved a situation in which the owner of several bars (Holstun) was charged with, among other things, conspiracy to violate the Alcoholic Beverage Control Act. The evidence established that several females engaged in drink solicitation activities, and that the bar owner and his manager were aware of and encouraged such activities. At the time of *Holstun*’s prosecution, section 25657 was slightly different than the current language of the section. Rather

than prohibiting the employment of “any person for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages,” the section at that time prohibited the employment of “any hostess or entertainer” for that purpose. Holstun asserted that the failure to define the word “hostess” rendered the section unconstitutionally vague and uncertain. The Court reviewed the earlier case of *Cooper v. State Board of Equalization* (1955) 137 Cal.App.2d 672 in which both section 25657 and a similar provision in Penal Code section 303 were analyzed, based upon the same argument that the language of the statutes was so broad that they could be applied to legitimate entertainers and wait staff.

11. In *Cooper*, the Board of Equalization, as predecessor to the Department, disciplined an alcoholic beverage licensee based upon violations of section 25657 and Penal Code section 303. The facts involved typical drink solicitation activities in which women directly solicited patrons to purchase them drinks. As indicated above, the licensees attacked the statute on vagueness grounds. The Court gave “scant consideration” to this assertion, holding that “[t]he Legislature obviously intended to prohibit the direct ‘procuring or encouraging the purchase’ of alcoholic beverages, and not the incidental increase of consumption of liquor by persons watching entertainment furnished by the management. We have no difficulty in holding that the statute clearly and without ambiguity only prohibits direct solicitation of drinks, and does not prohibit the purchase of drinks by patrons of their own initiative and volition while watching entertainment or when asked by a waitress if they desire service.” (*Id.*, at 680.)

12. The Court in *Holstun* (*supra*, 167 Cal.App.2d at 488) cited this language from *Cooper*, but it phrased the purpose of the statute somewhat differently. In addressing the use of the word “hostess” the Court held, “[i]t is apparent that it was the legislative intent to prohibit the direct ‘procuring or encouraging of the purchase’ of alcoholic beverages, by a female attendant employed at on-sale premises, if her duties as such attendant include dispensing hospitality by such methods as receiving, entertaining, or drinking with male customers.” (*Id.*)

13. Both *Cooper* and *Holstun* hold that there must be evidence of “direct” action by the persons engaging in the prohibited activity. While it is clear that most cases involving drink solicitation do indeed involve evidence of unambiguous requests that patrons purchase alcoholic beverages for the requestor, neither *Cooper* nor *Holstun* foreclose the possibility that “direct” solicitation or the “procuring or encouraging of the purchase” of alcoholic beverages may be established by the totality of the circumstances, even without words of solicitation actually being uttered. Examples that may establish such circumstances could include evidence that payment for the alcoholic beverages served and consumed by the companions was required by the establishment to be included in the purchase price paid by the patron (beyond merely paying the bill without question); statements (whether during the undercover portion of the investigation or through interviews or affidavits obtained subsequently) made by the companions that their duties included encouraging patrons to procure or purchase alcoholic beverages or greater quantities of alcoholic beverages, rather than merely providing companionship; that the companions’

compensation was based in some respect on the amount of alcoholic beverages purchased; or that the companions are only provided in connection with the purchase of alcoholic beverages, as opposed to being made available regardless of what may be purchased by the patrons. Expert witness testimony may also be helpful in understanding how and why certain businesses are operated the way they are, and how and why the companions provided engage in the activities they do, and how that leads to the inevitable conclusion that they are employed for the purpose of procuring or encouraging the purchase of alcoholic beverages.

14. The Department here is asking that inferences be drawn from the limited investigation conducted and evidence presented at hearing. Unfortunately, what is being asked is more than drawing reasonable inferences; rather, it requires a degree of speculation as to the reasons for the actions of the women involved. In this case, the Department has not met its burden.

15. Section 23804 provides that the violation of a condition placed upon a license constitutes the exercise of a privilege or the performing of an act for which a license is required without the authority thereof and constitutes grounds for the suspension or revocation of the license.

16. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) on the basis that on June 17, 2016, the Respondent violated two conditions attached to his license in violation of section 23804. (Findings of Fact ¶¶ 4-16.)

17. With respect to condition #14(a) (count 1), the evidence established that the Karaoke rooms' doors and windows were covered with a dark tint. Such tinting is in contravention of the requirement that the glass be "clear." The foregoing finding is based primarily on Agent Groff's testimony. Although the photos contained in exhibits 7 and 8 are of poor quality, they clearly show tinting consistent with his testimony. The Respondent's self-serving testimony to the contrary is not credible and is rejected.

18. With respect to condition #15 (count 6), the evidence established that the Respondent's employees (a number of male servers), brought a series of women into the room who, once selected, sat with the officers. The evidence further established that Park, another of the Respondent's employees, negotiated payment for Julie and Kayla, the two women who actually sat with the officers.

PENALTY

The Department requested that the Respondent's license be suspended for a period of 15 days, with 5 days stayed, for the two condition violations. This recommendation is consistent with the recommended penalty for first-time violations of section 23804 as set forth in rule 144.⁴

The Department further recommended a three-year stayed revocation of the Respondent's license, coupled with a 40-day suspension, for the violations of sections 24200.5(b) and 25657(a) alleged in the accusation. The Department argued that an aggravated penalty was warranted over that set forth in rule 144 based on the openness of the activity, the direct involvement of the Respondent's employees, and the employees' efforts to evade police.

The Respondent argued that all counts should be dismissed and did not recommend a penalty in the event that they were not.

There are no aggravating or mitigating factors with respect to the two condition violations. Although the Respondent testified that he removed the tinting after the violations at issue here, he did not offer any explanation for placing the tinting on the windows in the first place. Absent such evidence, his subsequent remedial actions do not warrant mitigation given the plain language of the condition.

In light of the Department's failure to establish a violation of section 24200.5(b) or section 25657(a), no further discussion of the penalties associated with such violations is necessary.

ORDER

With respect to counts 1 and 6, the Respondent's on-sale general eating place license is hereby suspended for a period of 15 days, with execution of 5 days of the suspension stayed, upon the condition that no subsequent final determination be made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred within one year from the effective date of this decision; that should such determination be made, the Director of the Department of Alcoholic Beverage Control may, in his discretion and without further hearing, vacate this stay order and reimpose the stayed penalty; and that should no such determination be made, the stay shall become permanent.

Counts 2, 3, 4, and 5 are dismissed.

⁴ All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

Du Hee Bae dba Pharos Shrine
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Sacramento, California

Dated: January 26, 2018

A handwritten signature in blue ink that reads "Jacob A. Appelsmith". The signature is written in a cursive style and is positioned above a horizontal line.

Jacob A. Appelsmith
Director

Pursuant to Government Code section 11521(a), any party may petition for reconsideration of this decision. The Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or on the effective date of the decision, whichever is earlier.

Any appeal of this decision must be made in accordance with Chapter 1.5, Articles 3, 4 and 5, Division 9, of the Business and Professions Code. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.