

ISSUED MARCH 6, 1998

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

| | | |
|---------------------------------|---|--------------------------|
| CONCHA R. and GEORGE L. BARBOSA |) | AB-6823 |
| dba George's Place |) | |
| 4531 Putah Creek Road |) | File: 40-117813 |
| Winters, California 95694, |) | Reg: 96037356 |
| Appellants/Licensees, |) | |
| |) | Administrative Law Judge |
| vs. |) | at the Dept. Hearing: |
| |) | Sonny Lo |
| DEPARTMENT OF ALCOHOLIC |) | |
| BEVERAGE CONTROL, |) | Date and Place of the |
| Respondent. |) | Appeals Board Hearing: |
| |) | Sacramento, CA |
| |) | December 3, 1997 |
| |) | |

Concha R. and George L. Barbosa, doing business as George's Place (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their on-sale beer license for appellant George L. Barbosa having pleaded nolo contendere to an information charging him with violations of Penal Code §664, subdivision (a), and Penal Code §496, subdivision (a), (attempted receiving of stolen property), crimes involving moral turpitude, being contrary to the universal and generic

¹ The decision of the Department, dated February 27, 1997, is set forth in the appendix.

public welfare and morals provisions of the California Constitution, article XX, §22, and Business and Professions Code §24200, subdivision (d), arising from a violation of the aforesaid Penal Code provisions.

Appearances on appeal include appellants Concha R. and George L. Barbosa, appearing through their counsel, Matthew V. Brady, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer license was issued on February 9, 1982. Thereafter, the Department instituted an accusation alleging that grounds for revocation of appellants' license existed in that appellant George L. Barbosa had entered a plea of nolo contendere to an information charging him with the attempted receipt of stolen property.

An administrative hearing was held on January 16, 1997, at which time documentary evidence was received concerning appellant George L. Barbosa's plea of nolo contendere and his conviction upon such plea (Exhibit 2).

Subsequent to the hearing, the Department issued its decision ordering appellants' license revoked on the basis of George L. Barbosa's conviction of crimes involving moral turpitude. Appellants thereafter filed a timely notice of appeal.

In their appeal, appellants raise the following issues: (1) their request for a continuance so that they could retain an attorney was improperly denied; (2) without

counsel, appellants were unable to present evidence of facts underlying and explaining the reasons for the entry of the plea of nolo contendere; (3) the rights of the co-licensee spouse were violated, since she was free of culpability; and (4) the penalty of revocation was excessive.

DISCUSSION

I

Appellants contend their request for a continuance, so that they could retain counsel, was improperly denied.

The record reveals that, as early as November 1996, and again on January 2, 1997, appellants were informed by the attorney who had represented appellant George Barbosa in the criminal proceeding that he did not intend to represent him in the Department of Alcoholic Beverage Control hearing, because he had not been paid for his earlier services. Nonetheless, appellants waited until January 15, 1997, one day before the scheduled hearing, to seek a continuance. This was clearly untimely, and the decision of the Administrative Law Judge (ALJ) to deny the request was clearly within his discretion.

Appellants argue that they were prejudiced because, had they been represented by an attorney, evidence could have been presented about the facts underlying the entry of the plea of nolo contendere. Appellants also argue the ALJ erred in refusing to hear evidence that the plea was the result of a business decision based on the potential

cost of defending against the charges, made with the understanding, based upon advice they received from private counsel, that their license to sell alcoholic beverages would not be affected, and that the criminal offense resulted from a sting operation and involved only a small amount of money.

These arguments are without merit.

The evidence appellants say they would have offered was not relevant to the matter before the Department. The Department's concern was the propriety of one of its licenses being held by a person who had admitted, by way of the plea of nolo contendere, to the admission of a criminal offense involving moral turpitude. The Department is not obligated, in such circumstances, to look behind the entry of the plea to determine what the motivating factors were for the entry of the plea. Business and Professions Code §24200, subdivision (d), states that the entry of a plea of nolo contendere to a public offense involving moral turpitude is a ground constituting a basis for the suspension or revocation of a license.

While no definition of what constitutes "moral turpitude" has been given by the Legislature, the courts have found certain acts to involve moral turpitude, such as crimes involving theft, receiving stolen property, extortion and fraud.²

² See In re Rothrock (1944) 25 Cal.2d 588 [154 P.2d 392, 393]; Re Application of McKelvey (1927) 82 Cal.App. 426 [255 P. 384]; Re Application of Stevens (1922) 59 Cal.App.251 [210 P. 422]; and Re Application of Thompson (1918) 37 Cal.App. 344 [174 P. 86].

The court in Rice v. Alcoholic Beverage Control Appeals Board, supra stated that “moral turpitude is inherent in crimes involving fraudulent intent, intentional dishonesty for purposes of personal gain” Also, see Ullah (1994) AB-6414, where the crimes of insurance fraud, grand theft, and perjury were held to be crimes of “moral turpitude,” and substantially related to the duties, functions, and qualifications of a licensee.

It is apparent that the plea of nolo contendere was the product of some sort of plea bargain between appellant George Barbosa and the prosecuting authorities. The Department is not privy to such negotiations, nor is it bound by them. By the same token, the prosecuting authorities are guided by considerations that do not, and, doubtless, cannot accommodate concerns possibly held by the Department. It is for these reasons that the Department must make its own determinations within the powers granted it by the California Legislature and the duties entrusted to it by the California Constitution to safeguard the public welfare and morals with respect to the sale and consumption of alcoholic beverages. Among others, one such determination the Department must make is whether it is consistent with the Department’s constitutionally-imposed duties to continue in force a license held by a licensee convicted on his own plea of a crime involving dishonesty. This Board is unable to say that the determination made by the Department in this case was an abuse of discretion.

Appellant Concha Barbosa asserts that her due process rights are violated by the revocation of the license, since she is innocent of culpability.

It is well-settled that the Department has the power to revoke the license. See Rice v. Alcoholic Beverage Control Appeals Board (1979) 89 Cal.App.3d 30, 39 [152 Cal.Rptr. 252], a case upholding a license revocation where, as here, it was claimed the rights of an innocent spouse were being violated.

In addition, it should be noted that Department Rule 58 (4 Cal.Code Regs., §58) provides that where the business is the community property of husband and wife, a license can be issued or held in the name of either spouse if it can be demonstrated by evidence satisfactory to the Department that the unlicensed spouse "is qualified," but for reasons set forth in the rule cannot participate in the operation of the business. Appellants clearly could not qualify under Rule 58.

In Coletti v. State Board of Equalization (1949) 94 Cal.App.2d 61 [209 P.2d 984, 986], a case cited in Rice, supra, the court sustained the Board's revocation of a license held by a partnership because of conduct on the part of only one of the partners, stating, in part:

"Revocation of a partnership license brings about a harsh result as to an innocent partner, but this result cannot be avoided in the present circumstances. The innocent partner must suffer unless the guilty one goes unpunished. Certainly the board does not act arbitrarily in revoking a partnership license where one partner has been found guilty of violations of law which call for revocation. There is no force in the argument that one partner in a liquor license cannot be bound by acts of a co-partner which place the license in jeopardy. When two or more persons apply for a partnership license, each of them necessarily assumes

responsibility for the acts of others with relation to the conditions under which the license is held.”

III

Appellants contend the penalty is excessive.

The Department has considerable discretion with respect to the penalty to be imposed. In the circumstances of this case, we are unable to say the Department has abused that discretion.

CONCLUSION

The decision of the Department is affirmed.³

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

³This 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 may, before this final decision becomes effective, 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.