

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

AB-8135

File: 20-273088 Reg: 02053901

JAVIER GUTIERREZ and MARIA DELIA GUTIERREZ dba Imperial Tortilleria
3717 East First Street, Los Angeles, CA 90063,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: June 10, 2004
Los Angeles, CA

ISSUED JULY 30, 2004

Javier Gutierrez and Maria Delia Gutierrez, doing business as Imperial Tortilleria (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their license following appellant Maria Delia Gutierrez's conviction on her plea of guilty to a charge of violating Penal Code section 496, subdivision (a), by receiving and concealing stolen property, a crime involving moral turpitude.

Appearances on appeal include appellants Javier Gutierrez and Maria Delia Gutierrez, appearing through their counsel, Anthony O. Egbase, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on June 24, 1992. The accusation against appellants charged that appellant Maria Delia Gutierrez entered a

¹The decision of the Department, dated April 17, 2003, is set forth in the appendix.

plea of nolo contendere to an information charging one count of violating Penal Code section 496, subdivision (a).

An administrative hearing was held on March 27, 2003, at which time oral and documentary evidence was received. At that hearing, the Department placed in evidence certified copies of the information and a record of the proceedings which established the entry of the nolo contendere plea. Appellant Maria Delia Gutierrez, testifying on behalf of appellants, admitted that she had been convicted of receiving stolen property, stated that the offense had occurred at a market she owned, and not at the licensed premises. She also testified that she had paid a fine of \$4,500, had been placed on probation, continues to do business at the market, her husband has high blood pressure and is unable to work full time, she has four children, aged 5, 10, 18 and 20, three of whom reside with her, and the loss of income from the sale of alcoholic beverages will prevent her from meeting the monthly expenses of her business.

Subsequent to the hearing, the Department determined that the charge of the accusation had been proven and ordered the license revoked

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) the administrative law judge (ALJ) erred in ordering revocation when only one licensee was convicted; (2) the Department abused its discretion when it ordered the license revoked; and (3) the Department failed to consider the hardship that appellants would experience. Issues 1 and 2 are essentially the same, and will be discussed together.

DISCUSSION

I

Appellants appear to concede that the crime for which appellant was convicted was an offense involving moral turpitude, but contend the Department should not have revoked the license where only one of the licensees has suffered a conviction.

Appellants argue that section 24200, subdivisions (a) and (d), cannot be interpreted to permit the revocation of a license partly owned by one who has not been convicted of a crime involving moral turpitude.

It is well settled that the Department has the power to revoke a license held jointly by co-licensees where one of the co-licensees has been convicted of an offense involving moral turpitude. (*Rice v. Alcoholic Beverage Control Appeals Board* (1979) 89 Cal.App.3d 30 [152 Cal.Rptr. 285].)

In *Rice v. Alcoholic Beverage Control Appeals Board*, *supra*, an argument identical to that urged by appellants was found “unconvincing:”

Under the relevant constitutional and statutory provisions, the Department is expressly empowered to suspend or revoke an issued license ... ; the propriety of the penalty to be imposed rests solely within the discretion of the Department whose determination may not be disturbed in the absence of a showing of palpable abuse. ... The fact that unconditional revocation may appear too harsh a penalty does not entitle a reviewing agency or court to substitute its own judgment therein ... ; nor does the circumstance of forfeiture of the interest of an otherwise innocent colicensee sanction a different or less drastic penalty.

(89 Cal.App.3d at p. 39.) (Internal citations omitted.)

The same issue was presented and the same result reached in *Coletti v. State Board of Equalization* (1949) 94 Cal.App.2d 61, 64-65 [209 P.2d 984], where the court explained:

There is, however, no authority in the board to revoke a partnership license as to the interest of one of the partners. There was but a single license, although it stood in the names of the two partners. It cannot be invalid as to one partner and valid as to the other.

The revocation was effective as to both partners or to neither. It is clear that it was the duty of the board to revoke Gerbosi's rights under the license. He violated the conditions under which it was held when he engaged in the illegal sale of liquor. It would be a violation of section 3 of the act for him to exercise any of the rights and privileges of a licensee. What he cannot do as an individual he cannot do through a partnership. Revocation of a partnership license brings 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 unauthorized acts of a co-partner which place the license in jeopardy.

Since the Department clearly had the power and authority to enter the order of revocation, appellants' argument that it was obligated to impose a lesser penalty must be rejected.

II

Appellants contend that the ALJ failed to consider the evidence of hardship when imposing revocation.

The ALJ did consider appellants' evidence of hardship. In Determination of Issues II, he took heed of appellants' argument that the crime did not occur on the licensed premises, that appellants needed the license for their livelihood, that appellant Maria Gutierrez had already paid \$4,500 in restitution and 500 hours of community service, and that this was her first offense. He found that the demand for "strict adherence to basic honor and honesty" outweighed those considerations. We cannot say he erred in doing so.

III

Appellants' counsel represented at the hearing of this matter that, after the entry of the Department's order, the charges against appellant Maria Gutierrez had been dismissed pursuant to Penal Code section 1203.4, and that, as a consequence, the Department should be required to revisit its order of revocation.

There is nothing in the record that any relief has been granted pursuant to section 1203.4. But, even if there was, we would have to reject the argument.

Under Penal Code section 1203.4, a court may permit a defendant who has successfully completed probation to withdraw any plea of guilty or nolo contendere and obtain a dismissal of the accusation or information against that defendant, and "a release from all penalties and disabilities resulting from the offense of which he or she has been convicted."

The same contention was made and rejected in *Copeland v. Department of Alcoholic Beverage Control* (1966) 241 Cal.App.2d 186 [50 Cal.Rptr. 452]. In *Copeland* the relief under section 1203.4 had been granted *before* the Department's order of revocation. The court reasoned as follows:

As used in section 1203.4 of the Penal Code the words "penalties and disabilities" have reference to criminal penalties and disabilities or to matters of a kindred nature. But the disciplining of licensees such as the petitioners herein is for the protection of the public in the exercise of the police power and not for the purpose of punishing any licensee. (Citation) It is settled that proceedings to suspend or revoke business or professional licenses are not included among the penalties and disabilities that are released by a dismissal pursuant to section 1203.4.

We see no reason why this case should not be controlling.

ORDER

The decision of the Department is affirmed.²

TED HUNT, CHAIRMAN
KAREN GETMAN, 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.